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In the Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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MICHAEL RODAK, JR.

No. .....

J. J. NOSSER, ET AL.,
Petitioners,

vs.

JAMES BRADLEY, ET AL. and KATIE RUTH ANDERSON, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, J. J. Nosser, et al., respectfully pray that a Writ of Certiorari issue to review the March 3, 1972 Judgment and Opinion of an en banc court of the United States Court of Appeals for the Fifth Circuit entered in this suit for damages under 42 U.S.C.A., §1983.

OPINIONS BELOW

The decision of the panel of the United States Court of Appeals for the Fifth Circuit is reported at 438 F.2d 138 (1971). It appears in the Appendix hereto as Appendix "A". The as yet unreported decision of the en banc court, Fifth Circuit, 1972, ... F.2d ..... [No. 289781, March 3, 1972], is included as Appendix "B".

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit, sitting en banc, was entered on March 3, 1972. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioners Robinson and Breazeale were denied their Seventh Amendment right of trial by jury by the direction of verdicts against them for failure to promptly take arrestees before a magistrate and denial of due process, respectively, after a verdict for the Defendants on both issues.

2. Whether the Defendant Breazeale is liable under *respondeat superior* for the torts of his subordinates under 42 U.S.C. §1983.

3. Whether, on the merits, Defendant Breazeale was liable for the summary infliction of punishment under the due process clause for the measures taken with respect to the detainees at Parchman Penitentiary.

4. Whether the defendant Robinson is liable under State law for failing to take the respondents, whose detention was valid, before a magistrate.

5. Whether the defendant Breazeale is immune from this action in damages.

6. Whether the Fifth Circuit correctly applied its own substantial evidence standard for submission of a case to the jury. Otherwise put, whether there was a conflict in the substantial evidence as to whether the asserted summary punishment was actually inflicted at the Penitentiary and whether Breazeale ordered it.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

The Fifth, Seventh and Eighth Amendments to the Constitution of the United States; and Section 1 of the Fourteenth Amendment to the Constitution.

STATEMENT OF THE CASE

The Respondents-detainees were first arrested on October 2, 1965, in Natchez, Mississippi. They were taken in custody under a parade ordinance while they were engaged in a racial protest demonstration. Approximately 700 persons were arrested.

Many of those arrested, particularly minors, were allowed to post bond or be released on their personal recognizance. Others could not make bond. Most of the arrests took place on Saturday and Sunday, October 2 and 3. By reason of the numerous arrests, the unavailability of a magistrate for the weekend, and the need for facilities to hold those arrested, the offenders were not taken before a magistrate.

No jail facilities were available in Natchez for those arrested. Chief of Police Robinson attempted to arrange with adjacent counties and municipalities for jail space but had no success. He then arranged to have some of the prisoners sent to Parchman State Penitentiary, some 215 miles from Natchez.

Some 150 of those demonstrators temporarily detained at the Natchez City Auditorium were, on the evening of October 2, transported by bus to the Mississippi State Penitentiary. On the sprawling penal farm, there was no stockade for confinement except at the maximum security unit. Accordingly, the prisoners were dispatched there.

There were 39 vacant cells in the unit, which were by Monday ultimately filled with more than 250 prisoners.

The procedure followed for these detainees, which has given rise to the claim of summary punishment without due process, was the standard internment procedure for maximum security. Male prisoners were deprived of their clothing and issued underwear as their sole wearing apparel. There was a shortage of underwear which resulted in *some* of the detainees being left without clothing for periods as long as 36 hours. Some were allowed to reclaim their own underwear. All prisoners were offered and some took a laxative. The women arrestees were deprived of their coats and outer garments as well as their stockings, but were permitted to wear their dresses and under garments.

The arrestees had 39 cells among them. Each cell had two bunkbeds, one lavatory and one commode. The temperature remained between 60 degrees and 70 degrees. Mattresses, pillows and covers were not available in every room. Between four and eight persons slept in each cell on the steel beds or on the floor. The remaining discomfiture was said to be that toilet paper and sanitary napkins were not generally available, although the evidence on the point conflicted.

The en banc court held these facts made out a case of summary punishment without due process against prison superintendant Breazeale as a matter of law. Earlier, a trial by jury in the district court had resulted in a verdict for all Defendants on all issues. The panel decision, reversing, directed a verdict against *all* Defendants on the pendent state law claim for failure to take the Defendants before a magistrate. It further directed a verdict against all Defendants on the substantive constitutional claim of cruel and unusual punishment.

The en banc court modified the panel decision by holding that the challenged treatment was summary punishment without due process of law rather than the infliction of cruel and unusual treatment under the Eighth Amendment. Both the panel and the en banc court apparently concluded that the jury's findings were against the substantial weight of the evidence and could be set aside. Upsetting these jury verdicts on a finding that they were unsupported by substantial evidence, raises issues of the Defendants' right to trial by jury under the Seventh Amendment, since the evidence was definitely conflicting.

The panel decision did not disturb the jury's finding of no liability for a constitutional tort of false imprisonment. On the related pendent jurisdictional claim for failure to take Plaintiffs before a magistrate promptly, the panel decision directed a verdict of joint and several liability against all Defendants, both those in Natchez, Mississippi, where the Respondents were apprehended, and at Parchman, Mississippi, where they were subsequently detained. The en banc court affirmed this direction of the verdict but limited it to certain Defendants, which will be discussed individually below. On the separate pendent claim that the prison superintendent and the arresting officers in Natchez were vicariously liable for mistreatment of the prisoners under Section 7930, Mississippi Code of 1942 (1964 annual supplement), the panel likewise directed a verdict against Superintendent Breazeale, Natchez Chief of Police Robinson and his subordinate officers. This blanket direction of verdict for state law violations against all Defendants, based on an interlocking chain of causation was overturned by the en banc court on the basis that it was not submitted to the jury and could not be taken from them.

The liability of the various individual Defendants was narrowed by the en banc court. The liability for failure to take Respondents before a magistrate was restricted to the Defendant Natchez Chief of Police Robinson. The panel decision had held the Defendant Robinson and four (4) police officers liable for this violation on the theory that each had played a substantial role in bringing about the results, and that the inferior officers were similarly liable even though acting under orders. The en banc decision confined this liability to the Chief of Police on the theory that there were conflicting facts for the jury on whether the inferior officers made any arrests or were in a position to make any. In the context of a jury case, the en banc court accordingly found that the liability for appearance before a magistrate was a jury question, and that the panel should not have directed a verdict against all of the officers. Likewise, the Defendant Breazeale, who had similarly suffered a directed verdict based on the earlier treatment in Natchez was exonerated from the directed verdict for failure to take the Respondents before a magistrate, in which he played no part.

Liability for the treatment in confinement at Parchman Penitentiary was tightened to a narrower ambit of Defendants. The en banc court affirmed the direction of this verdict against Superintendent Breazeale but released the Natchez officers from the verdict on the theory that no inference of the foreseeable subsequent punishment existed as to the Natchez officers. For that reason, a directed verdict on the Section 1983 claim was voided as to the Natchez Defendants.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. This Court has not since *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), except implicitly in per curiam decisions, treated the weight of evidence necessary to reach the jury. Differing standards have been offered, ranging from the long rejected scintilla rule, *Improvement Co.* v. *Munson*, 14 Wall (81 U.S.) 442, 20 L.Ed. 867 (1871) to the substantial evidence rule we challenge here. The Court's utterances about the Seventh Amendment have generally been in the context of F.E.L.A. and Jones Act cases. This has given rise to speculation among the commentators and the bar as to what showing is necessary to resist a motion for directed verdict. Predictably, a split in the circuits has developed over the proper test.[1] The Fifth Circuit has utilized the substantial evidence test since *Wells* v. *Warren Co.*, 5 Cir., 1964, 328 F.2d 666. The Fifth Circuit has recently reaffirmed en banc its choice of the substantial evidence test. This test is at variance with the rule followed in the Eighth Circuit: *Ozark Airlines, Inc.* v. *Larimer*, 8 Cir., 1965, 352 F.2d 9 ["A quantity of evidence reasonably supporting the verdict."]; the Tenth Circuit: *Champion Homebuilders* v. *Shumate*, 10 Cir., 1965, 388 F.2d 806 [evidence must be all one way.]; the Ninth Circuit: *McCollum* v. *Smith*, 9 Cir., 1964, 339 F.2d 348 [Whether evidence "would rationally support a verdict" for the nonmoving party.]; D.C. Circuit: *Muldrow* v. *Daly*, D.C. Cir., 1964, 329 F.2d 886 ["No reasonable man could reach a contrary verdict."]. These citations do not exhaust the conflicts between all the circuits based on each circuit's refinements of the test used.

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1. Apparently the First Circuit follows the substantial evidence test. *Magnat Corp.* v. *B & B Electroplating*, 1 Cir., 1966, 358 F.2d 794.

It is critically important for this Court to rejuvenate the Seventh Amendment by enunciating a standard which, by whatever terms, secures the right to reach a jury unless only one reasonable conclusion could be reached as to the verdict. This is as necessary for the guidance of bench and bar as it is to secure the often cited goal of preserving the role of the jury as "an essential factor in the process for which the Federal Constitution provides." *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953, 964 (1958). Such a case as this one provides a compelling framework for such a decision.

2. Here jury verdicts were had as to all defendants on all issues. Both the panel and en banc court of the Fifth Circuit directed verdicts on matters submitted to the jury and determined by them. The role of the jury in this case is even more important in that the panel and the en banc court differed as to which verdicts were to be directed and as to which defendants. The conclusion that reasonable men could not differ as to the verdicts pales in the light of two overlapping sets of appellate judges reaching different conclusions.

2. Certiorari is indicated to resolve the lingering problem of liability of a prison superintendent for the unauthorized actions of his subordinates. The testimony is clear that Superintendent Breazeale's standard operating procedure in maximum security was that male detainees would remove their clothes, and that detainees of both sexes would be offered or given a laxative. The other asserted treatment which the en banc court held to be summary punishment in violation of due process was undertaken as to some detainees by guards who acted without authorization, and who were not sued. These claimed indignities, such as the asserted deprivation of toilet paper, sanitary napkins, mattresses to sleep on and

underwear are stoutly contested on the evidence. It was never established that defendant Breazeale knew of these practices or of their currency among all of the prisoners.

Since prison administration has become a frequent object of attack, *Haynes* v. *Kerner*, No. 70-5025, Jan. 13, 1972, 40 L.W. 4156, the extent to which superintendents are answerable for their employees' acts is a live issue, and an issue on which the lower courts are divided. See *F. Nugent* v. *Sheppard*, 318 F.Supp. 314, 315 (N.D. Indiana, 1970); *Sanberg* v. *Daley*, 306 F.Supp. 277 (N.D. Illinois, 1970); *Roberts* v. *Williams*, 302 F.Supp. 987 (N.D. Miss., 1969), with *Hill* v. *Toll*, 320 F.Supp. 185 (E.D. Pennsylvania, 1970). Inexplicably the law of the Fifth Circuit is opposed to *respondeat superior* as to supervisory law enforcement officers. *Nesmith* v. *Alford*, 5 Cir., 1963, 318 F.2d 110; *Metoyer* v. *Holman*, 5 Cir., 1966, 358 F.2d 110, 111. In each case, supervisory police personnel were relieved of liability where they had no direct knowledge of or participation in tortious conduct.

3. Certiorari should issue to test the contours of the due process clause as it governs summary punishment. The en banc court, citing *Screws* v. *United States*, 325 U.S. 89, 65 S.Ct. 1031, 89 L.Ed. 1495 (1944), held the various facets of confinement at Parchman to be such summary punishment. It should be remembered that *Screws* was a case of a knuckle and blackjack beating of a prisoner for some thirty minutes, resulting in unconsciousness and death.

None of the claimed treatment taken separately could legitimately be said to offend the Constitution or the sensibilities of the general public. Taking clothes from male prisoners and reissuing underwear was a security precaution. Nor was the administration of a laxative an

affront to decency in that no one was force fed anything. Laxatives were offered and were taken by some. Nor could remaining unclothed in the mild sixty to seventy degree temperature for some hours be thought to be summary punishment, if indeed some of the prisoners remained in this condition. Leaving aside the conflict of evidence on the issue of the scarcity of toilet paper and sanitary napkins, this is certainly not the type of treatment condemned in *Screws*. In sum, these measures taken individually would give rise to no such due process claim, but in the aggregate were said by the en banc court to be a violation of due process, even though there was no showing as to how many persons were subjected to the various kinds of treatment. If due process will embrace this claim, the Court will be turning once again to due process "as the source of substantative constitutional rights even where the rights were not specifically enumerated in the Bill of Rights." It is a long way from the constitutional right to travel abroad, to travel interstate and to have marital privacy to the notions of due process which underlay the en banc court's decision. See *Carr* v. *Schmidt*, 5 Cir., 1972, ... F.2d ..... [No. 31045, April 28, 1972, at pages 12-13].

4. Defendant Chief of Police Robinson's liability on a pendent State law claim for failure to take the respondents before a magistrate does not harmonize with (1) the jury's finding, (2) the Fifth Circuit's admission that the detention was valid based upon *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), (3) the proffered justification for the failure to take the respondents before a magistrate, and (4) the uniform and consistent precedents of the State courts of Mississippi that a failure to take arrestees before a magistrate does not in and of itself create a violation of State law.

5. Certiorari is appropriate to re-examine and reaffirm the doctrine of official immunity. The decision of the Fifth Circuit holding defendant Breazeale is inconsistent with that circuit's holding concerning federal officers. *Norton* v. *McShane,* 5 Cir., 1964, 332 F.2d 855. It is simply the perennial unresolved problem of one law for Greece and another law for Rome. A more specific consideration in favor of a grant of certiorari is the conflict among the circuits ensuing from *Morgan* v. *Willingham,* 10th Cir., 1970, 424 F.2d 200, where immunity was extended to a federal prison warden. No plausible explanation suggests itself for immunity for a federal warden while his State counterpart is held liable.

6. Should the Court decline to re-examine its precedents on the standards for a directed verdict, certiorari is compelled to determine whether the Fifth Circuit has substituted its own verdict where the jury reached a contrary verdict on a weighing of conflicting evidence.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Infringes the Petitioner's Right to Trial by Jury, under the Seventh Amendment, by Directing a Verdict on the Ground That There Was No Conflict in the Substantial Evidence.

The rule utilized by the Fifth Circuit to override the verdict of the jury stems from *Boeing Co.* v. *Shipman,* 5 Cir., 1969, 411 F.2d 365, 374-376. There the Fifth Circuit held that there must be substantial evidence opposed to the motions to avoid a directed verdict. ". . . If there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment

might reach different conclusions, the motion should be denied, and the case submitted to the jury." *Id.* at 374. The Court dismissed out of hand the old "scintilla" rule but frankly acknowledged that this Court has not answered the question of law as to whether its decisions in F.E.L.A. and Jones Act cases spill over into nonstatutory jury actions.

As otherwise argued in this petition, the petitioners suggest that the result achieved in the appellate Court represented "a search for one possible view of the case which will make the jury's finding inconsistent [and therefore] result in a collision with the Seventh Amendment." *Atlantic and Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). It is elsewhere stressed in this petition that the only uncontradicted evidence concerning the treatment in the penitentiary was that the men's clothes were taken and that all of the detainees were offered or given a laxative. Otherwise, it was manfully disputed by competent evidence that underwear was not provided, that toilet paper was unavailable and that sanitary napkins were in short supply.

The cavalier manner in which the jury's findings were disregarded on appeal clearly raises a constitutional question. The question is two dimensional. Petitioners first stress that the rule announced in F.E.L.A. cases is an unvarnished statement of the Seventh Amendment's requirements, not merely a statutory variant of that rule. Second, it is clear that outside the F.E.L.A. area, this Court's decisions do not evince support for the "substantial evidence" rule applied in this circuit.

The true rule was announced by this Court in *Brady* v. *Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943):

> "When the evidence is such that without weighing the credibility of the witnesses there can be *but one reasonable conclusion* [emphasis supplied] as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The *one reasonable conclusion standard* represents adequate supervision over juries; it does not hark back to the "scintilla" rule. A jury should not be allowed to rest its verdict on testimony which is contradicted by indisputable physical fact or laws of nature, but its judgments should not be second-guessed where the evidence was conflicting. *Wilkerson* v. *McCarty,* 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949).

As the commentators have so often argued, this Court's F.E.L.A. cases have announced a rule that refers to "the jury's historic function" and to the Seventh Amendment. The Court has itself cited these cases as representing the "federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." Significantly, this Court has also reversed per curiam judgments of lower courts which have substituted their views of the sufficiency of the evidence for that of the jury in non-F.E.L.A. cases. Finally, it is thought that Congress has not broadened the role of the jury in these statutory actions beyond the role of the jury guaranteed by the Seventh Amendment. 2-B Baron and Holtzoff, *Fed. Practice and Procedure,* §1075, pages 400-404, and cases there cited.

The Court has been very nearly as clear on the requirements for submission of a case to the jury outside these statutory actions. *Galloway* v. *United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943). To the same effect is *Lavender* v. *Kurn,* 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). The position we offer the Court is the golden mean between extremes. On the one hand, there is the rejected scintilla test. On the other, there is the Fifth Circuit's substantial evidence test. The remaining rule, this Court's rule, is that a verdict shall be directed only when there is "one reasonable conclusion as to the verdict." This test reserves to the trial court sufficient armament to deal with inherently incredible testimony, testimony at variance with indisputable facts, and other imponderables that present themselves at trial. At the same time, it leaves open the way for the evidence to be weighed in favor of the party against whom the motion is made. Saying that a non-movant will fail if he presents no substantial evidence on his claim erodes the rule that the evidence shall be weighed in his favor. Such rules as the substantial evidence test defeat the governing purpose of the Seventh Amendment as stated by Mr. Justice Brandeis:

> "The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex parte Peterson,* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, 923-924 (1920).

The potential that the substantial evidence rule has for manipulating jury verdicts is underscored by language from this Court's opinion in *Galloway,* supra:

> "Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury But standards

> . . . cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. The matter is essentially one to be worked out in particular situations and for particular type cases. Whatever may be the general formulation, the essential requirement is that *mere speculation be not allowed to do duty for probative facts,* [emphasis supplied] after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. A mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence or on motion from a directed verdict, cannot amount to a departure from 'the rules of the common law' which the amendment requires to be followed."

It is not only substantial evidence of the non-movant that must reach the jury, but evidence beyond mere speculation or conjecture. Under such rules as the substantial evidence test a much greater weight of evidence is necessary to get to the jury than this Court's reading of the Seventh Amendment would permit. *Raytheon Mfg. Co.* v. *Radio Corporation of America,* C.C.A. Mass. 1935, 76 F.2d 943, affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327.

II.

Vicarious Liability Against the Defendant Prison Superintendent Breazeale (Under Either the Common Law or 42 U.S.C. §1983) Is Forbidden for Unauthorized or Unknown Acts.

Defendant Breazeale's participation in the alleged wrongs was limited to his standing order that male

prisoners would turn in their civilian clothes and receive others. His procedures also included laxatives for the prisoners. Beyond that, all other features of the alleged treatment in maximum security were without Breazeale's knowledge, direction or cooperation. It has been the common law rule time out of mind that public officers are not responsible for the negligence, postive wrongs or omissions of duty of their subordinates. *Robertson* v. *Sichel*, 127 U.S. 507, 8 S.Ct. 1286, 32 L.Ed. 203, 206 (1887). There appears to be no erosion of this ancient common law rule in the decisions of this Court. Second, vicarious liability against Breazeale is not supported textually from the act. "Every person who, under color of law, . . ." can be held liable for deprivation of rights secured by the Constitution. 42 U.S.C. §1983. The statute is clearly aimed at those who subject others to the deprivation of their rights, not the State or city which employs them or *the official with ultimate authority over them in the governmental hierarchy* [emphasis supplied]. *Sanberg* v. *Daley*, 306 F.Supp. 276, 278 (N.D. Ill., 1970).

In its decision in *Robertson* v. *Sichel*, supra, a suit against the collector of customs for the Port of New York to recover damages for lost cargo, the Court put to rest vicarious liability against public officials. Relying on the treatises of Justice Storey, the Court stated:

> "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses which would be subversive of the public interests. [omitting citations]

"The head of a department, or other superior functionary, is not in a different position. A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Id.* at 206.

This Court also noted that any other rule would paralyze the public service in that competent persons would not fill such positions if they knew they might be held liable for the wrongs committed by a large body of subordinates which such officers could not possibly supervise in person.

Nonliability of such supervisory officers is a theme which has been carried forward in the law with only few defections.[2]

Until the decision here sought to be reviewed, the Fifth Circuit had shunned vicarious liability under 42 U.S.C. §1983. In *Nesmith* v. *Alford*, 5 Cir., 1963, 318 F.2d 110, 127, 129, an affair growing out of an inter-racial dinner party, the Fifth Circuit held that the plaintiffs were entitled to judgment as a matter of law on false imprisonment against those three officers who had actually participated in their arrest. Significantly, the direction of a verdict was affirmed for a defendant, one Captain Eiland, who as desk captain merely received a complaint and

2. The main such deviation from the Robertson rule is *Hill* v. *Toll*, 320 F.Supp. 185 (E.D. Penn., 1970). The *Toll* Court frankly acknowledged at Page 189 that the bulk of authority was contrary to the position it was taking. The tort-feasor in *Toll* was a compensated bail bond company which violated the terms of the plaintiff's bail bond contract, seized him, beat him and detained him. *Toll* is also distinguishable on the basis that the tort-feasor was a surety company given the power of detention by Pennsylvania statute.

Apparently, agency concepts were held to have more vitality where a defendant was performing services for hire.

assigned an officer to investigate. Later Eiland, in his same capacity as desk captain, issued the warrants on the basis of competent affidavits. Clearly, Eiland was outside active participation with the venture just as Breazeale played no part in the arguably actionable aspects of the treatment at Parchman. Somewhat later, in *Metoyer* v. *Holman*, 5 Cir., 1966, 358 F.2d 110, 111, the Fifth Circuit upheld the direction of a verdict for the warden of the Alabama State Penitentiary. In *Metoyer*, a prisoner who had attempted to escape from a vegetable picking detail was shot by a custodial officer. Warden Holman's directed verdict was upheld on the basis of a complete absence of evidence that he knew or played any part in, or was negligent in the incident involving the plaintiff.

Numerous district courts have treated claims for vicarious liability under §1983 and, with insignificant exceptions, have all declined to impose it. The stated rationale has been that personal involvement is contemplated in constitutional torts premised on §1983. *Salazar* v. *Dowd*, 256 F.Supp. 220, 223 (Dist. Colorado, 1966); *Nugent* v. *Sheppard*, 318 F.Supp. 314, 315 (N.D. Ind., 1970); *Roberts* v. *Williams*, 302 F.Supp. 987 (N.D. Miss., 1969); *Runnels* v. *Parker*, 263 F.Supp. 271 (C.D. Calif., 1967); *Patrum* v. *Martin*, 292 F.Supp. 370 (W.D. Kentucky, 1968); *Mack* v. *Lewis*, 298 F.Supp. 1351 (S.D. Ga., 1969). The citations supporting this rule are compounded *infinitum* in these selected cases.

Petitioners believe that this Court has amply foreshadowed the result we seek on vicarious liability by its statements in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There this Court stated that §1983 ". . . should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The proper focus is imposition of liability

upon blameworthy individuals, not liability based on agency concepts which overlook the actual knowledge or participation of a given defendant. Additional precautions should be taken not to invest §1983 with an overlayer of respondeat superior. If this should be established, the further difficulty would arise of determining the exact nature of respondeat superior doctrine to be applied. Should it be a uniform federal rule, e.g., *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed 838 (1943), or resort to state diversities, e.g., *Campbell* v. *City of Haverhill,* 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895). Assuming the federal rule should be chosen, it would have to be made from whole cloth.

III.

The Custodial Procedures at Parchman Penitentiary Do Not Constitute a Denial of Fundamental Fairness Within the Purview of Fifth Amendment Due Process.

The factual background and its treatment by one jury and two appellate courts compound the difficulty of exactly what treatment to measure by the due process standard. Nevertheless, petitioners believe that the treatment accorded the respondents at Parchman Penitentiary was not summary punishment prohibited by the Fifth Amendment. It is well to note that this Court's cases, *Screws* v. *United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1944); *Monroe* v. *Pape,* 365 U.S. 167 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), concern unbridled brutality and, in the case of *Pape,* compounded violations of well known constitutional requirements of criminal procedure. There could have been no justification raised in either case based on the exigencies of law enforcement or the pressure of the moment.

The Court should be mindful that the issue of justification for the detention and subsequent measures was submitted to the jury whose response was a verdict for the defendant. Each of the two appellate courts has looked past the jury verdict to impose a label on the conduct which it does not fit. The panel decision was at great pains to point out that as detainees rather than convicted persons, the respondents were entitled to a better fate. But this does not go so far as to say that treatment better than they deserved was necessarily a constitutional wrong. The decision sought to be reviewed here pitched the constitutional violation to summary punishment offending due process. The fundamental principle said to be involved was that no punishment of mere arrestees could be had without a trial. *Nosser,* slip opinion, supra, at page 10.

Assuming that the treatment occurred no one would deny that it might be offensive to some. Yet whether it rises to the dignity of summary punishment is an altogether different inquiry. Whatever the due process standard may be, it is certainly something more than treatment which may offend sensibilities. It must violate the "scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288, 292 (1937). To be offensive under the due process clause, State action must "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1933). Although the due process concept is fluid, it should not grow and do service where it does not violate well known and time tested perimeters. As this Court has said, conduct is to be tested against the due process clause by a double-edged inquiry:

> "The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and par-

ticular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts* v. *Brady*, 316 U.S. 455, 462, 86 L.Ed. 1595, 1601 62 S.Ct. 1252 (1941).

It could not be fairly said that we are really talking about procedure, per se. We are talking about substantive due process for persons who were incarcerated as of right. This Court should therefore be mindful that in sanctioning the en banc decision of the Fifth Circuit, it is lending undefined growth to due process—due process in the substantive area where the breakthroughs have been few and limited since the Court turned away from substantive due process in the 1930's. Where the Court has revived substantive due process, it has done so with the conviction that the rights asserted were fundamental in every sense to our form of government and to rudimentary concepts of individual liberty.[3]

IV.

The Defendant Robinson Was Not Liable to Plaintiffs for Failure to Take the Plaintiffs Before a Magistrate under State Law Because the Detention Was Valid and the Reasonableness and Justification for the Delay Was a Jury Question.

The Court of Appeals for the Fifth Circuit concluded:

"That a verdict should have been directed on the

3. *Kent* v. *Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

cause of action based on pendant jurisdiction. That Plaintiffs were not taken before a magistrate within a reasonable time as required by the Mississippi Statute. Miss. Code Ann., §2473."

Apparently, the Court found that since the Natchez Police Chief (Robinson) had acted in good faith and with probable cause, the Defendant was not liable to Plaintiffs for false arrests, but that the imprisonment incident to the arrests was unlawful and in violation of Section 2473, Mississippi Code, Annotated, 1942. This holding is difficult to understand in view of this Court's decision in *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). *Pierson*, supra, is identical to the case sub judice. Pierson and others were arrested in Jackson, Mississippi, by the Jackson City Police and imprisoned in the municipal jail. They were charged by Captain Ray with disorderly conduct under a Mississippi statute. The said arrests took place "about 11:20 o'clock in the forenoon of *September 13, 1961,*" and Plaintiffs remained in jail from that time until they were brought before the municipal judge on *September 15, 1961*. Plaintiffs later instituted in the Federal District Court an action for damages against the said police officers alleging a *Mississippi common law tort claim* for false arrests and *false imprisonment* and a statutory (42 U.S.C. §1983) claim for damages for a deprivation of civil rights. The cause was tried before a jury which returned a verdict for all of the Defendants and an appeal was taken to this Court. The Court of Appeals for the Fifth Circuit stated that the *common law tort claim for false imprisonment* was controlled by Mississippi law citing as authority *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and held that:

"[T]he doctrine of immunity which has long prevailed with respect to judicial officers, has been ex-

tended to other officers of government whose duties are related to the judicial process. *Barr* v. *Matteo,* 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434, *Norton* v. *McShane,* 5th Cir. 1964, 332 F.2d 855, cert. den. 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274; *Gregoire* v. *Biddle,* 2nd Cir. 1949, 177 F.2d 579, cert. den. 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363. *In this cause, as in* Norton v. McShane, supra, *the doctrine of official immunity protects the police officers from common-law false-imprisonment liability.*" (Emphasis added) page 217.

This Court in *Pierson* v. *Ray,* 386 U.S. 547, approved the holding that the *doctrine of immunity applied to the Mississippi common law tort action of false arrest and false imprisonment,* but reversed this Court as to the 42 U.S.C. §1983 claim and stated that the defense which this Court found available to the officers in the said common law action for false arrests and false imprisonment was also available to them in the action under 42 U.S.C. §1983. Therefore, the holding of the Court of Appeals in the cause sub judice is in direct conflict with this Court's decision in *Pierson,* supra.

The Court of Appeals appears to be of the opinion that even though the arrests and initial imprisonment incident thereto was lawful, that said imprisonment became false because the Defendant police chief of Natchez, Mississippi did not take the Plaintiffs before a magistrate as required by Section 2473, Mississippi Code, Annotated, 1942. The Court paid lip service to the proposition that what constituted unreasonable or unnecessary delay under that section must be determined from the facts and circumstances of each case, but held that as a matter of law Robinson had violated said section because "there is nothing in this record to demonstrate that an unsuccess-

ful attempt was made to secure a magistrate for any of the Plaintiffs." We submit to the Court that under the circumstances, as reflected by the record, the actions of the Defendant police chief did not constitute unreasonable or unnecessary delay. The question of the reasonableness or necessity of delay was submitted to the jury. The jury found that Robinson's actions did not constitute unreasonable or unnecessary delay and the Court of Appeals was bound by that finding. This action being founded in Mississippi common law should and must be controlled by the law of Mississippi. The first arrests were made in Natchez, Mississippi on a Saturday afternoon. Since Plaintiffs were charged with violating a city ordinance, the only *proper officer* who could examine their cases was the municipal judge. The chief of police was well aware that the judge was not in his office on Saturday afternoons or on Sunday.

In *Robinson* v. *State*, 223 Miss. 70, 79, 77 So.2d 265, cert. den. 350 U.S. 851, 76 S.Ct. 91, 100 L.Ed. 750 (1955) the Mississippi Supreme Court held that since the "arrests occurred on a Sunday, on which day neither the grand jury nor a justice of the peace were in session", the delay in bringing an arrestee before a proper officer for examination of his case on the following Monday did not amount to unreasonable or unnecessary delay as contemplated by said Section 2473. *The Mississippi Court did not impose upon the police officers the duty of making any attempt to bring the said arrestee before a magistrate on Sunday.*

In *Moore* v. *State*, 207 Miss. 140, 155, 41 So.2d 368 (1949), the Mississippi Supreme Court stated that:

> "[I]n this state the magistrate and other courts are open only *within legal hours, that is to say, in the daytime*, and it was a reasonable exercise of the right of

> the officers, under Section 2473, Mississippi Code of 1942, requiring only that a person making an arrest shall take the defendant before an officer 'without unnecessary delay' for examination of his case, when they questioned him on the evening of his arrest in regard to his connection with the commission of several major crimes." (Emphasis added)

Under Section 3374-103, Mississippi Code, Annotated, 1942, a municipal justice "shall hold court every day except Sunday and legal holidays, if the business of the municipality so requires." Therefore, under the case law of Mississippi, police officers can take judicial notice that the police justice *would not be available on Sunday* and in Natchez, Mississippi on Saturday afternoon since in the past "business of the municipality [had not] so require(d)."

The Mississippi case of *Kelley* v. *Yearwood*, 204 Miss. 181, 37 So.2d 174 (1948), establishes that an arrestee has "no right to demand a detention in any particular place." And that it is not necessary that the arresting officer make any attempt to bring the arrestee before a proper officer under said Section 2473. The only question for determination is whether a delay was unnecessary and unreasonable and that the determination of said question was for the jury. In *Kelley*, a Mississippi highway patrolman arrested a Mrs. Yearwood on a Sunday afternoon and placed her in jail at Hattiesburg, Mississippi. A check of the record filed in the Mississippi Supreme Court shows that the Defendant testified *that he made no attempt at any time to bring the Plaintiff before a proper officer for examination of her case as provided for by said Section 2473.* We submit to the Court that *Kelley* v. *Yearwood*, supra, affirms that under Mississippi law the mere fact that a police officer makes no attempt to bring an arrestee before the proper officer to examine the arrestee's case,

in and of itself, does not create a violation of said Section 2473 and that the only question is whether under the circumstances the delay was unreasonable and unnecessary. We suggest to the Court that the actions taken by the chief of police of Natchez, Mississippi, under the circumstances as reflected in the record in this cause, R. 302-4, 501, 509-10, 530, could in no way be characterized as unreasonable.

Further, it is significant to note that the Court of Appeals based the liability upon a breach of Defendant police officers' duty under said Section 2473. Under Mississippi law, as pronounced in *M. T. Reed Const. Co.* v. *Jackson Mun. Airport Auth.*, 227 So.2d 466, 469 (1969):

> "[T]he presumption of law is that public officials will perform their duties in accordance with law."

In *National Labor Relations Board* v. *Bibb Mfg. Co.*, 188 F.2d 825, this Court stated at page 827:

> "[D]uly appointed public officers, such as members of the police department of a municipality, are presumed to discharge their duties impartially according to law, and *this presumption must be overcome by clear and convincing evidence to the contrary.*" (Emphasis added)

Since the district court had authority to entertain the state common law claim of false imprisonment under the doctrine of pendent jurisdiction, the Court of Appeals in divining controlling Mississippi law must resolve all doubts in favor of the Defendant and further must liberally construe state law for the benefit of the Defendant. This is necessary since the party invoking pendent jurisdiction has deprived the other party, Petitioner herein, the right to have the claim finally reviewed by the Supreme Court

of Mississippi. Presumptively, the Supreme Court of Mississippi has the authority to modify, change or overrule previous decisions of that Court whereas the federal forum is limited to application of the state law. For a federal forum to construe controlling state law more favorable to the party invoking the pendent jurisdiction would subject that jurisdiction to a constitutional infirmity based on due process and equal protection of the laws. Pendent jurisdiction, unlike the removal statutes and diversity of citizenship actions, is a Court-conceived principle resting upon convenience and is not supported by a compelling federal interest. Succinctly stated, since Defendant is being deprived of review by the Mississippi Supreme Court which can change or reverse its prior decisions, then any and all doubts as to the state law *must* be resolved in favor of the said Defendants.

The Mississippi Supreme Court has always been reluctant to allow claims sounding in false imprisonment and has always adhered to the rule that a claim for false imprisonment will not lie "if there was in fact probable cause for arrest and the arrest was made in the regular and proper manner." *King* v. *Weaver Pants Corp.*, 157 Miss. 77, 127 So. 718, 720 (1930).

This holding is the sense of Section 2474, Mississippi Code, 1942 Annotated, whereby the legislature immunized those making arrests "as authorized or required by law" from civil and criminal liability "notwithstanding it may appear that the party arrested was innocent of any offense."

From a detailed analysis of the decisions of the Mississippi Supreme Court speaking to false imprisonment, it appears crystal clear that the said Court has placed a heavy burden upon the party asserting false imprison-

ment and has always held that party to strict proof of his or her claim. This position is embodied in *Ex parte Peter Jefferson*, 62 Miss. 223, 227 (1884), wherein the Court stated:

> "[I]t must be presumed in the absence of testimony that the justice of the peace performed his duty and that a preliminary examination was waived."

We submit to the Court that since there has been no supervening change in the law this case is controlled by *Pierson* v. *Ray*, 386 U.S. 547. Therefore, since the Court of Appeals held that the arrests made by the Natchez police officers were made in good faith and with probable cause, then the imprisonment incident thereto was lawful and said Defendant is protected by the doctrine of official immunity as announced in the *Pierson*, supra, decision. Independent of the doctrine of official immunity, under Mississippi law Defendant is not liable to Plaintiffs for false imprisonment since the jury found that under the circumstances of this case the delay was not unreasonable and unnecessary.

V.

The Defendant Breazeale Is Immune from This Action in Damages.

The original panel of the Court of Appeals held that:

> "The Mississippi common law recognizes no immunity for sheriffs, wardens, police officers or firemen charged with false imprisonment or tortious treatment of prisoners [and] likewise, there is no immunity for these officials under Section 1983."

This declaration is a complete reversal of the decisions of that Court in *Norton* v. *McShane*, 332 F.2d 855; *Pierson* v. *Ray*, 352 F.2d 213; *Martone* v. *McKeithen*, 413 F.2d

1373 and this Court's decision in *Pierson* v. *Ray*, 386 U.S. 547. Further, such declaration is at odds with the common law of Mississippi as announced by the Mississippi Supreme Court in *Golden* v. *Thompson*, 194 Miss. 241, 11 So.2d 906 (1943); *DeWitt* v. *Thompson*, 192 Miss. 615, 7 So.2d 529 (1942); *Jones* v. *Loving*, 55 Miss. 109 (1877); *Bell* v. *McKinney*, 63 Miss. 187 (1885); *National Surety Company* v. *Miller*, 124 So. 251 (1929); *State* v. *Dear*, 46 So.2d 100; *Barnett* v. *Lollar*, 19 So.2d 748 (1944); and *Lincoln County* v. *Greene*, 111 Miss. 32, 71 So. 171 (1916).

The doctrine of official immunity is supported by a legion of cases, both federal and state, and has gone unsuccessfully challenged in this country since *Spalding* v. *Vilas*, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896) and is deeply rooted in the English common law. *Dawkins* v. *Paulet*, L.R., 5 Q.B. 94.

Why any doubt has lingered as to the application of official immunity to the executive branch of *state* government is a judicial mystery since nothing in the origin or purpose of the immunity doctrine ever created such a doubt. This Court did not hesitate to apply official immunity to state legislators, *Tenny* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), and state judges, *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967):

> "[W]e do not believe that this settled principle of law [official immunity] was abolished by Section 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. 554.

It can now be stated that all common law immunities are still viable; that they apply with equal and like force to *state* officials as they do to federal officials and that they are in no way restricted by the Civil Rights Acts. Therefore, it is difficult to conceive why the Court of Appeals decided to reject out of hand all controlling law and hold that this Defendant was not protected from damage suits by the doctrine of official immunity.

A survey of the federal decisional law appears to contradict the panel's declaration.

In *Williams* v. *Craven*, 273 F.Supp. 649, 650 (1967), the Court held that:

> "[T]he Department of Corrections, the Adult Authority, and the *warden* [California State Prison] enjoy judicial immunity under these circumstances." (Emphasis added)

In *Rhodes* v. *Meyer*, 225 F.Supp. 80, 107 (1963), the Court stated that:

> "[T]he court now finds and concludes that all of the defendants within the description of . . . (4) sheriff and deputy sheriff of Morrill County, Nebraska, and members of safety patrol and (5) warden, deputy warden, and medical attendant or officer of the Nebraska State Penitentiary, are, at all times involved herein were, immune to suit for acts by them, or any of them, done in the course of the execution and performance of the duties of their respective offices or positions."

In *Belveal* v. *Bray*, 253 F.Supp. 606, 609 (1966), the Court stated:

> "[A]pplying these principles [official immunity] to the various classes of defendants in the instant case,

it is clear that the motions of Urich Grout and Tinsley [Warden of Colorado State Prison] must be granted."

In *Delaney* v. *Shobe*, 235 F.Supp. 662, 666 (1964), the Court stated that:

"[A]s for the defendant, Clarence T. Gladden, as Warden [of Oregon State Prison], the unvarying rule appears to be that jailers, institutional superintendents and keepers of almost all varieties enjoy a sweeping immunity under the Civil Rights Act. Indeed, as will be noted shortly, the United States Court of Appeals for the Ninth Circuit has extended the immunity to cases involving alleged malice."

In *Peckham* v. *Scanlon*, 241 F.2d 761, 763 (1957), the Court held that:

"[U]nder the case last cited, it would appear that the defendant Scanlon, as Warden of the Cooke County jail, is also immune."

In *Lang* v. *Wood*, 92 F.2d 211, cert. den. 302 U.S. 686 (1937), the Court held that the Warden of the United States Northeastern Penitentiary enjoyed governmental immunity. Likewise in *Black* v. *Stanley*, 270 F.Supp. 993, 996, cert. den. 390 U.S. 925 (1967), the Court held that:

"[T]he claimed liability under the Civil Rights Act, including 42 U.S.C.A., Section 1983 and 28 U.S.C.A., Section 1343, of the defendant, J. T. Willingham, as Warden of the United States Penitentiary at Leavenworth, and of the defendant, Franklin, is spurious and must be denied . . . [doctrine of official immunity]."

In *Silver* v. *Dickson*, 403 F.2d 642, 644 (1968), the Court held that the doctrine of official immunity was applicable to members of the California State Parole Board

charged with violations of the Civil Rights Acts since said Board performed "either quasi-judicial functions or discretionary governmental functions authorized by unquestioned statutes and closely related to the operation of a state judicial and *penal system.*" (Emphasis added)

We submit to the Court that the federal decisional law supports Defendant's position that he is immune from civil liability under and by virtue of the doctrine of official immunity even as to claims asserted under the Civil Rights Acts.

Plaintiffs' answer to Defendants' assertion that they are entitled to official immunity in this damage action shows that Plaintiffs have missed entirely the principle upon which this common law doctrine is based. The immunity granted to an official when carrying out his official duties is not for the benefit of the official but actually for the benefit of the public. As stated by the Court in *Barr* v. *Matteo,* 360 U.S. 564, 572-73, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959):

> "[T]he privilege is not a badge or emolument of exalted office, but an expression of policy to aid in the effective functioning of government."

The *Barr* Court further wrote that:

> "[T]he reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might ap-

preciably inhibit the fearless, vigorous, and effective administration of policies of government."

In answer to the suggestion that a distinction should be made between the guilty and the innocent, the *Barr* Court adopted the answer given by Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F.2d 579, 581, which was:

> ". . . if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

Further, the *Barr* Court borrowed the language in *Tenny* v. *Brandhove*, 341 U.S 367, as to the allegation of malice in the Complaint and stated:

> "[T]he privilege would be of little value if they could be subjected to the costs and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." 360 U.S. 575.

We suggest that if any public official needs the protection of the doctrine of official immunity it is a warden or superintendent of a state penitentiary. This official is involved daily with inmates who are no strangers to the Courts, have the advice and counsel of "jailhouse lawyers" and would like nothing better than to harass prison officials with damage suits. The Court is well aware of the avalanche of petitions for writ beas

corpus which has all but buried the district judges. We do not believe it is "crying wolf" to suggest that if state penitentiary officials no longer have official immunity then in the near future the Superintendent of Parchman will be faced with 1,853 personal damage actions. During a period when everyone is seeking to better prison conditions, it is inconceivable that a court would withdraw the doctrine of official immunity from the very position that will have the most to do with seeing that prison reform is not just the subject of after dinner speeches but becomes a reality.

Bearing in mind the reason for the doctrine of official immunity, it defies logic that a federal prison warden needs to be protected by this doctrine, *Morgan* v. *Willingham*, 424 F.2d 200, while a state prison warden does not need such protection. Further, it appears inconsistent to declare that a government psychiatrist needs to be immunized from a charge of false imprisonment, *Blitz* v. *Boog*, 2 Cir. 1964, 328 F.2d 596; *Norton* v. *McShane*, 332 F.2d 855, but the warden of a state penitentiary needs no such immunization.

We submit to the Court that once the word is disseminated inside prison walls that the Court has breached the heretofore impregnable wall of official immunity surrounding the superintendents and wardens of state prisons, the qualified prison personnel will be driven from their positions by harassing and vexatious damage suits to be replaced by "the most irresponsible."

With deference, we suggest that the path pointed out with the utmost clarity by the Court in *Barr* v. *Matteo*, 360 U.S. 564, 576, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), is appropriate for the Court to follow here. There the Court said:

> "[W]e are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. And there are, of course, other sanctions than civil tort suits available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner. We think that we should not be deterred from establishing the rule which we announced today by any such remote forebodings."

We submit to the Court that at all times during its deliberations, the Court must keep in mind, as reflected by *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), that just because a party might state a claim this in no way weakens the affirmative defense of official immunity. Many times a Court falls into error by following previous decisions which hold that a claim has been stated by the pleadings and/or by the proof, but in said cases, the doctrine of official immunity has not been pled, therefore cannot be relied upon.

In the case sub judice, we are not only concerned with the question whether a claim has been alleged and

proved, but also as to what extent the doctrine of official immunity affects such claim. We submit to the Court that in the case sub judice, the doctrine of official immunity, as pronounced by this Court, provides this Defendant with a complete defense to any claim, assuming arguendo that any claim was proven.

VI.

The Fifth Circuit Failed to Apply Its Own Substantial Evidence Tests in That Each Facet of the Claim Mistreatment Was Controverted by Competent Witnesses.

The Supreme Court of the United States, speaking through Mr. Justice Douglas, in *Atlantic and Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), correctly stated the proposition which is now urged upon the same Court by Petitioners:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.'"

In accord with this teaching we point out that there was a conflict in the substantial evidence as to the nature of the confinement at Parchman Penitentiary. A jury resolved this conflict in favor of the Defendants. Both the panel and the en banc court invaded the province of the jury.

There was consideration by a jury of all issues; just what those issues were is set forth in the record at pages

1234-1237 and reproduced in the Appendix as Appendix "C".

At the close of Plaintiffs' case, Defendants moved for directed verdicts and they were denied. Defendants presented their defenses and at the close of their case moved for directed verdicts and the Motions were denied except as to Harvey E. West, Marvin V. Collum, Jr., B. P. Pritchard, Mims Verry, and Walker Scruggs, individually and as former members of the State Penitentiary Board (R. 653). The granting of said Motion was acquiesced in by the Plaintiffs and therefore no appeal was taken therefrom (R. 653). The remaining issues were tried and determined by a biracial jury and a verdict rendered in behalf of all the Defendants.

Were the contested issues of fact indeed controverted by the taking of evidence so as to present an issue for determination by the jury? The able trial judge thought so and denied Motions for Directed Verdicts (R. 653). The testimony of a single witness, Thomas J. Licata, makes a controverted issue of almost every single contested fact as set forth in the pretrial order. The witness Licata testified that he accompanied the first group of prisoners to Parchman and that he remained with the prisoners in the maximum security unit during the entire time which said prisoners were incarcerated. Further, it was his duty and responsibility to make sure that the said prisoners, which included all Plaintiffs, were properly treated. His testimony as to the food given the detainees is included as Appendix "D".

As to the overall treatment of the prisoners at Parchman, we find the following testimony by the witness Licata which we excerpt for the sole purposes of showing that credible witnesses on the scene at Parchman dif-

fered sharply on the contested issue of whether napkins and toilet paper were available. See Appendix "E".

Further, as to the treatment of said prisoners, we find the following brought out by Plaintiffs on cross-examination:

"Q. Well, I didn't phrase that very well. What I meant was did the prisoners use up or run short of toilet paper?

A. Well, now, when we first got there to the best of my knowledge they were given plenty of toilet paper but they misused it.

* * *

A. They were issued toilet paper in a reasonable amount.

BY MR. JOLLES:

Q. I see. And when you say that they misused it what you mean is that they put it on their bunk, used it for padding on the bunk?

A. And also stopping up the toilets and the basins.

Q. But it is true that is what they were doing, at least in part, putting it on their bunk, is that right?

A. They could have. I have seen it laying on the bunk." (T. 557-558)

The testimony of Mr. Breazeale shows without contradiction that the rules and regulations promulgated by him for the treatment of prisoners incarcerated in the maximum security unit in no wise is violative of the Eighth Amendment to the Constitution of the United States. Mr. Breazeale testified that although the men prisoners were deprived of their clothing upon entering the maximum security unit that: "They are issued by the penitentiary a suit of underwear to wear at that time."

(T. 571). This testimony is substantiated by testimony of the Plaintiffs. Plaintiff Timothy B. Quinn testified to the following:

"Q. Now I believe you admitted a while ago that you did get a suit of underwear while you were at Parchman to wear, didn't you?
A. That's right." (T. 278-279)

Further, Plaintiff the Reverend Leon Howard testified to the following:

"Q. Now, you were given underwear to wear weren't you while you were up there?
A. Yes." (T. 424)

Defendant Breazeale testified that two ounces of milk of magnesia was offered to each of the prisoners upon entering the maximum security unit since "they are going to be inactive for—well, it is indefinite . . . so it is a precautionary measure or a preventive measure." (R. 572). There is testimony in the record by Plaintiffs that they were not required or forced to take the said laxative. On direct examination, Plaintiff the Reverend Henry Russell testified to the following:

"Q. Now, before being put into the cell were you given any medicine?
A. No. I wasn't given any medicine." (R. 358)

Plaintiff the Reverend Jesse Butler testified to the following:

"Q. Were you asked to take any type of medicine?
A. .Well, they brought some around but I did not take it." (R. 446)

Were Plaintiffs made to stand in the cold while being cursed and insulted by the Defendants? Witness Licata testified:

"Q. What were the weather conditions up there at Parchman? What was the temperature?

A. Well, I couldn't tell you exactly. It was a mild temperature, 65 or 60, something like that, maybe it got up to 70. It was the first of October.

Q. Did you see anybody mistreated, either on the part of the Plaintiffs, or then on the part of any guards or any trusties? Was anybody mistreated in your presence?

A. Not in my presence, no.

Q. Were you pretty well able to observe generally what was going on?

A. I was." (R. 551)

The issue of medical attention being refused or withheld was similarly refuted by the testimony of the witness Licata:

"Q. Did anybody ask you anything about any medical assistance?

A. Oh, yes, whenever anyone was sick or needed to go to the doctor they would send for the doctor.

Q. Who arranged that?

A. I did, through the sergeant that was in charge of maximum security." (R. 554)

The central issue may be narrowed into one:

"Were plaintiffs deprived of human dignity?"

Again, the Court's attention is directed to the testimony of the witness Licata:

"Q. Hmmhmm. Did you have occasion to see most of them during that period of time?

A. Oh, yes, I walked down through the cell block.

Q. Did you talk to any of them?

A. Oh, yes, I talked to them. I knew most of them.

Q. Did any of them have any complaints?

A. Well, if they had any complaints, I tried to the best of my ability to satisfy them." (R. 554)

In further disputing the general allegation of neglect or mistreatment, the defendant Breazeale's testimony

speaks of reason and concern for the welfare of the plaintiffs together with the other prisoners from Natchez not parties plaintiff.

"Q. Do you recall when you had some city prisoners from the City of Natchez at the penitentiary, sir?
A. Yes.
Q. Where were they housed?
A. They were housed at the maximum security unit.
Q. And why did you make the decision to house them there, sir?
A. It was the only available space. All of the camps were occupied by felons, and I didn't think it was advisable to mix these prisoners who were just being brought up there for board so to speak. We had nothing whatever to do with them except to accommodate the officials of Natchez and take care of them because they said their facilities were not sufficient." (R. 568)

"Q. Were you down at the maximum security unit at any time when the City of Natchez prisoners were housed there, sir?
A. Yes, sir, I went down there one time during that time that they were there.
Q. Did you actually go back in the cell blocks?
A. I did not see any of the Natchez prisoners.
Q. Did you discuss this housing with the guard there at the maximum security?
A. Well, about the only discussion that I had with the guards was as to how they was getting along and if everything was all right and they were being well taken care of and so forth." (R. 577)

Although at first blush it might appear to be needless repetition, it is important to show a dispute with respect to another area which was resolved by the jury in

defendants' favor. The charge was made that male plaintiffs were made to strip naked and remain so for a day or more and female plaintiffs were required to expose themselves to the view and obscene remarks of male prison employees and others. This charge was not only put in dispute by the defendants but by plaintiffs.

Defendant Breazeale testified that although the men prisoners were deprived of their clothing upon entering the maximum security unit that: "They are issued by the penitentiary a suit of underwear to wear at that time." (R. 571) This testimony is substantiated by testimony of the plaintiffs. Plaintiff Timothy B. Quinn testified to the following:

> "Q. Now I believe you admitted a while ago that you did get a suit of underwear while you were at Parchman to wear, didn't you?
> A. That's right." (R. 278-279)

Plaintiff Leon Howard testified to the following:

> "Q. Now, you were given underwear to wear, weren't you, while you were up there?
> A. Yes." (R. 424)

The treatment with respect to female plaintiffs and their state of undress or exposure is explained at page 205, where the following language is found:

> "The female prisoners, including all the female plaintiffs that had been arrested on Saturday, were required to remove their shoes, stockings, sweaters, coats, jewelry and wigs, but not their undergarments, dresses, blouses and pants, and were searched by female employees and trustees."

In sum, the defense to the action was the testimony of witnesses that the allegations of mistreatment asserted

by the plaintiffs were not true. Under traditional notions, the jury chose the witness to believe. Having reached their conclusion to overturn their verdict, the appellate court was redetermining the facts found by them. Petitioners respectfully submit that the Court of Appeals not be allowed to re-examine jury determinations on controverted facts.

CONCLUSION

The writ should issue to allow this court to reformulate and reaffirm its earlier cases on the quantum of proof necessary to go to the jury. This would have the additional effect of resolving the hopeless conflict among the circuits on that issue.

Affirming the great weight of authority that vicarious liability for supervisory law enforcement officers does not exist under 42 U.S.C. 1983 or the common law is both a legal and a practical necessity. This court should also define the contours of summary punishment under the Fifth Amendment. Both issues are worthy of plenary consideration by this court.

Finally, state law liability for Chief Robinson's acts, official immunity, and invasion of the jury's province under the Fifth Circuit's prevailing standard merit review by this court.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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COPY

71-1571

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

J. J. NOSSER, ET AL.,
Petitioners,

vs.

JAMES BRADLEY, ET AL. and KATIE RUTH ANDERSON, ET AL.,
Respondents.

Supreme Court, U. S.
FILED
JUN 1 1972
MICHAEL RODAK, JR., CLERK

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX "A"

Katie Ruth ANDERSON et al.,
Plaintiffs-Appellants,

v.

J. J. NOSSER et al., Defendants-Appellees.

James BRADLEY et al., Plaintiffs-Appellants,

v.

J. J. NOSSER et al., Defendants-Appellees.

No. 28971.

United States Court of Appeals,
Fifth Circuit.

Feb. 10, 1971.

Rehearing Granted and Rehearing En Banc Granted May 27, 1971.

Action against various state and municipal officials by racial protest demonstrators to recover, under federal Civil Rights Act and Mississippi state law, for subjecting demonstrators to cruel and unusual treatment, false imprisonment, and false arrest. The United States District Court for the Northern District of Mississippi, William C. Keady, Chief Judge, rendered judgment for defendants, and plaintiffs appealed. The Court of Appeals, Goldberg, Circuit Judge, held that where racial protest demonstrators, who were incarcerated only to assure presence at trial, with male prisoners required to strip naked and remain in such state of unattire for up to 32 hours, who were detained in cells with inadequate hygienic facilities, absence of bedding, and with female prisoners required to strip to their undergarments and permitted to carry in no personal belongings including medicine or sanitary napkins and who were given

quantity of laxatives, had been subjected to cruel and unusual punishment in violation of the Eighth Amendment. The Court further held that plaintiffs failed to state cause of action under Civil Rights Act for failure to bring them before magistrate without unreasonable delay.

Reversed and remanded in part.

Bell, Circuit Judge, concurred specially and filed opinion.

1. Civil Rights (Key) 13

Damage action against individuals acting under color of state law for deprivation of federal constitutional rights will lie under Civil Rights Act. 42 U.S.C.A. § 1983.

2. Courts (Key) 263

Doctrine of pendent jurisdiction permits a consideration of related state claims along with substantial federal claim.

3. Courts (Key) 263

Action under Civil Rights Act charging state and municipal officials with subjecting arrestees to cruel and inhuman treatment during incarceration pending posting of bond stated substantial federal question and, thus, state counts, which were grounded on incarceration and treatment, would be considered by federal court under pendent jurisdiction since state and federal counts arose out of a common nucleus of operative facts. 42 U.S.C.A. § 1983.

4. Civil Rights (Key) 13

Cruel and unusual punishment clause of the Eighth Amendment is applicable to the state and, thus, violation of its mandate may constitute a cause of action cognizable

in federal courts under the Civil Rights Act. U.S.C.A. Const. Amends. 8, 14; 42 U.S.C.A. § 1983.

5. Prisons (Key) 4

Federal courts entertain some reluctance to interfere with a prison's internal discipline; however, such chariness does not mean that prison officials have unfettered discretion in treatment of their prisoners.

6. Criminal Law (Key) 1213

Cruel and unusual punishment clause of Eighth Amendment is a nonstatic, moral precept designed to curb treatment which offends contemporary standards of decency. U.S.C.A.Const. Amend. 8.

7. Criminal Law (Key) 1213

Cruel and unusual punishment clause of Eighth Amendment prohibits certain hard core inhuman treatment. U.S.C.A.Const. Amend. 8.

8. Civil Rights (Key) 13

Racial protest demonstrators, who were incarcerated only to assure presence at trial, with male prisoners required to strip naked and remain in such state of unattire for up to 32 hours, who were detained in cells with inadequate hygienic facilities, absence of bedding and with female prisoners required to strip to their undergarments and permitted to carry in no personal belongings including medicine or sanitary napkins and who were given quantity of laxatives and who brought action against state municipal officials under Civil Rights Act, had been subjected to cruel and unusual punishment in violation of the Eighth Amendment. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 8.

9. Prisons (Key) 9

General common law duty of custodian of a prisoner to take proper care of him is imposed on penitentiary superintendent under Mississippi law. Code Miss.1942, § 7930.

10. Criminal Law (Key) 1213

Civil rights protestors, who were detained in Mississippi penitentiary merely for purpose of detaining them for trial, with male prisoners forced to strip and remain naked for periods up to 32 hours and who were incarcerated in cells containing inadequate hygienic facilities, absence of bedding and heat and who brought action against state and municipal authorities, were subjected to inhuman treatment in violation of Mississippi statute imposing general common law duty of custodian of a prisoner to take proper care of him. Code Miss.1942, § 7930.

11. Civil Rights (Key) 1

False imprisonment can be the type of "constitutional tort" cognizable under federal Civil Rights Act. 42 U.S.C.A. § 1983.

12. Civil Rights (Key) 13

Evidence supported verdict in favor of state and municipal officials, who were sued for false arrest under federal Civil Rights Act and Mississippi state law and who defended on ground that parade ordinance under which the civil rights demonstrators were arrested had not been declared unconstitutional at time of arrest. 42 U.S.C.A. § 1983.

13. Civil Rights (Key) 13

Where city chief of police established that he believed he was doing his duty as peace officer in arresting civil

rights protestors for violating municipal parade ordinance, officers' immunity from liability for false arrest under federal Civil Rights Act and Mississippi law extended to his subordinates who were simply following chief's orders in participating in arrest. 42 U.S.C.A. § 1983.

14. False Imprisonment (Key) 10

Unreasonable or unnecessary delay in bringing a prisoner before a magistrate, despite good faith, may give rise to an action for false imprisonment.

15. Civil Rights (Key) 13

Constitutional Law (Key) 263

Racial protest demonstrators, who had been incarcerated in Mississippi penitentiary solely for purpose of detaining them for trial and who had been subjected to cruel and unusual punishment, had no claim under federal Civil Rights Act for unreasonable and unnecessary delay in bringing them before magistrate; even though failure to take them before a magistrate violated Mississippi law, it did not rise to status of denial of due process. 42 U.S.C.A. § 1983.

16. False Imprisonment (Key) 8

Under Mississippi law, delay in bringing a prisoner before a magistrate may give rise to an action for false imprisonment.

17. Criminal Law (Key) 224

Under Mississippi law, the theoretical availability of a bonding procedure does not immunize the incarceration of those arrested who either cannot make bond immediately or who are not permitted to do so; the sterile opportunity to make bond does not abate the right to a magistratical confrontation.

18. False Imprisonment (Key) 8

Where racial protest demonstrators, who were incarcerated in Mississippi penitentiary solely for purpose of holding them for trial, were incarcerated for a period in excess of three days without being taken before magistrate and it was not shown that magistrate was unavailable, notwithstanding that arrests were made on weekend, arrestees' state right to be taken before magistrate without unnecessary delay was violated and, thus, arrestees were entitled to recover from state and municipal officials for false imprisonment.

19. Civil Rights (Key) 13

Claim that minors participating in racial protest demonstrations were falsely imprisoned because of failure of state municipal officials to follow procedures of Mississippi Youth Correction Act and that demonstrators were falsely imprisoned because their transfer to Mississippi penitentiary by municipal authorities was in violation of state statute, did not rise to constitutional dimension so as to give right of action under federal Civil Rights Act. 42 U.S.C.A. § 1983.

20. Civil Rights (Key) 13

Where city police chief and police officers played substantial roles in detaining civil rights demonstrators, denying them access to a magistrate, and transporting them to Mississippi state penitentiary, where they were subjected to cruel and inhuman treatment in maximum security ward, and fire chief assisted officers in detention and ordered firemen both to escort buses and to remain at penitentiary for duration of incarceration and penitentiary's superintendent supervised and directed treatment and detention, situation was akin to that of a chain of command,

and thus, each official was liable jointly and severally under Mississippi law and federal Civil Rights Act for failure to bring arrestees before magistrate and for infliction of cruel and unusual punishment. 42 U.S.C.A. § 1983; Code Miss.1942, § 7930; U.S.C.A.Const. Amend. 8.

21. Civil Rights (Key) 13

Where three of six aldermen directly or indirectly participated in failure to bring civil rights protestors before magistrate and in subjecting them to subhuman treatment while incarcerated at Mississippi penitentiary, mayor of city, sued along with other officials under Civil Rights Act and state law, had no duty to act under penalty of damages, since he could not be required to do an act which would have been useless or ineffective; similarly, commissioner of highway safety patrol could not be found liable in absence of showing that he participated in, had knowledge of, or was negligent with regard to actions of highway patrolman who assisted in detention and transportation of demonstrators. 42 U.S.C.A. § 1983; Code Miss.1942, § 7930; U.S.C.A.Const. Amend. 8.

22. False Imprisonment (Key) 10

Mississippi common law recognizes no immunity for sheriffs, wardens, police officers, or firemen charged with false imprisonment or tortious treatment of prisoners.

23. Civil Rights (Key) 13

False Imprisonment (Key) 7(3), 11

City police chief, arresting officers, fire chief and firemen, sued under federal Civil Rights Act for subjecting civil rights demonstrators to cruel and unusual punishment and under Mississippi state law for false imprisonment and mistreatment of demonstrators at state penitentiary, were

not immune from liability for false imprisonment or tortious treatment of demonstrators. 42 U.S.C.A. § 1983; Code Miss.1942, § 7930; U.S.C.A.Const. Amend. 8.

24. Federal Civil Procedure (Key) 1537

Dismissal of action under federal Civil Rights Act and Mississippi state law for failure of racial protest demonstrators, who allegedly were subjected to cruel and unusual treatment and falsely imprisoned, to answer written interrogatories was error in absence of finding of willful disobedience, gross indifference or deliberate callousness and in view of fact that counsel was unable to contact all 150 plaintiffs in time allowed, including extension period. Fed.Rules Civ. Proc. rules 33, 37, 28 U.S.C.A.

Lawrence D. Ross, Jackson, Miss., Lawyers' Committee for Civil Rights Under Law, Bernard Jolles, Franklin, Bennett, Des Brisay & Jolles, Portland, Or., Robert L. Beerman, Morrison, Paul & Bailey, New York City, for plaintiffs-appellants.

A. F. Summer, Atty. Gen., William A. Allain, Asst. Atty. Gen., Jackson, Miss., Edwin E. Benoist, Jr., Joseph S. Zuccaro, Natchez, Miss., Charles A. Marx, Jackson, Miss., for defendants-appellees.

Before TUTTLE, BELL, and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

Our locale is Natchez, Mississippi, where the mood in the fall of A.D. 1965 was anything but irenic. Our story concerns the arrest and subsequent detention of participants in racial protest demonstrations. According to the undisputed facts those arrested were subjected to subhuman treatment which beggars justification and taxes

credulity. Finding ourselves unable to sustain the verdict of the jury below, we reverse and render judgment as to liability of the defendants and remand for the assessment of damages due the plaintiffs.

I.

While many peripheral matters in this case are hotly contested, the central and basic facts are largely uncontradicted. Relying solely on stipulations and undisputed testimony, we summarize the sordid details.

On October 2, 3, and 4, 1965, plaintiffs and many others paraded in Natchez to publicize their grievances, particularly discrimination on account of race. At the time a Natchez ordinance prohibited parades without the written permission of the Chief of Police. Natchez, Miss. Parade Ordinance of May 26, 1964, Ordinance Book F, at 395. The ordinance was later found unconstitutional, but at that time it had not been so declared.

Shortly after the march commenced on Saturday morning, October 2, defendant Robinson, Natchez Chief of Police, and defendants Rickard, Cowart and Beach, Natchez police officers, arrested approximately 700[1] persons for parading without a permit in violation of the Natchez ordinance. Following the arrests, plaintiffs and others were transported to the Natchez city auditorium. There defendant Flowers, a Natchez police officer, defendant Cameron, Natchez Fire Chief, and firemen acting pursuant to Cameron's directions assisted Chief Robinson and officers Rickard, Cowart, and Beach in detaining plaintiffs. There is

1. There is some dispute as to the number of protesters who were arrested. Plaintiffs contend that defendants' own records reveal that 520 arrests were made on Saturday, but defendants respond that those records are incomplete in that a number of children were released without being booked. For the purpose of this appeal, we accept defendants' figures as correct.

some evidence that many of those arrested, particularly minors, were permitted either to post bond or to obtain release on personal recognizance. The evidence, however, also reveals that many of those arrested were either not permitted to make bond or were unable to do so during the time they were incarcerated in Natchez. Furthermore, no effort was made to secure a magistrate, and as a result none of the plaintiffs or other arrestees were brought before a judicial officer for examination. No youth court order was obtained with respect to any of those arrested who were minors.[2]

Late that Saturday night approximately 150 of those held at the auditorium were transported by bus over 200 miles to the Mississippi State Penitentiary at Parchman. Mississippi Highway Safety Patrolmen provided the escort.[3] This initial group of prisoners arrived at the penitentiary early Sunday morning, October 3, and were taken to its maximum security unit upon order of defendant Breazeale, the penitentiary superintendent. Thirty-nine cells had been vacated in the unit, and, following the arrest and transfer of additional protesters on Sunday and Monday, more than 250 prisoners were ultimately housed there.

---

2. Subject to certain exceptions Mississippi law provides that the youth court "shall have original jurisdiction in all proceedings concerning any delinquent or neglected or battered child residing or being in the county." Miss. Code Ann. § 7185-03. And, "whenever any child thirteen years of age or older is brought before any justice of the peace court or municipal court charged with the commission of a misdemeanor under a state law or municipal ordinance, such court shall, unless prosecution is permitted by order of the youth court, transfer the case to the youth court of the county, to be dealt with as a case of delinquency in accordance with the provisions of this act. * * *" Id. § 7185-16.

3. While there may be some contradictions, we are bound by the evidence which would support a finding that this transfer was undertaken only after Chief Robinson ascertained that both Natchez and surrounding jail facilities were incapable of accommodating the large number of protesters. The evidence also shows, however, that no effort was made to continue processing those arrested so that all those able to do so would at least be able to post bond and obtain release.

Prison personnel were directed by Breazeale to process the Natchez protesters under the "standard" treatment accorded prisoners in the maximum security unit. Though there is some dispute as to exactly what this treatment entailed, the undisputed evidence reveals the following.

On arrival all male prisoners were required to strip naked and all women prisoners were ordered to remove their shoes, stockings, sweaters, coats, jewelry, and wigs. All were compelled to consume a laxative and were deprived of all personal belongings, including sanitary napkins and medicines. The prisoners were then led to the cells. Up to eight persons were placed in each cell, which contained two steel bunks without mattresses or other bedding, a toilet without a seat, and a washbasin. There were no towels or soap and there was inadequate toilet paper. The temperature ranged from 60 to 70 degrees, the chill being aggravated by exhaust fans which blew intermittently on the occupants. Some of the men eventually were permitted to get their underwear, but others were nude for a period of 36 hours. Many were subjected to blood tests. Moreover, while standing in the prison courtyard awaiting processing several plaintiffs were kicked, pushed, cursed, and abused by the highway patrolmen and other guards.

On Sunday morning, October 3, and Monday evening, October 4, more protest marchers were arrested and detained in Natchez. Nearly 100 were subsequently transported to Parchman and given similar treatment to that accorded the first group of prisoners. Plaintiffs, after individually posting $200 property bonds, were released on Monday, October 4, Tuesday, October 5, and on Wednesday, October 6.

On February 17, 1966, a complaint was filed on behalf of 68 adults and 84 minors, who had been detained in Parchman that October, against Chief of Police Robinson, Police

Officers Rickard, Cowart, Beach, and Flowers, Fire Chief Cameron, Superintendent Breazeale, J. J. Nosser, Mayor of Natchez, and T. B. Birdsong, Commissioner of Public Safety. That complaint alleged that plaintiffs were falsely imprisoned and subjected to cruel and unusual punishment, and sought monetary damages under 42 U.S.C.A. § 1983. An identical complaint on behalf of 11 additional persons was filed on October 1, 1966. Amended complaints were filed in each action on December 6 and 9, 1966, alleging false imprisonment and other torts under Mississippi law. The actions were consolidated and eventually ordered to trial in June of 1969, solely on the issue of liability. A jury returned a verdict for defendants, and plaintiffs' subsequent motions for judgment notwithstanding the verdict or alternatively for a new trial were overruled. Plaintiffs now appeal from the district court's denial of those motions.

II.

Plaintiffs rely on 42 U.S.C.A. § 1983 and Mississippi tort law joined under the doctrine of pendent jurisdiction to sustain their contention that defendants should be held liable as a matter of law.

[1] Since Monroe v. Pape, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 482, it has been clear that section 1983[4] will sustain a damage action against individuals acting under color of state law for deprivation of federal constitutional rights. *See also* Adickes v. S. H. Kress & Co., 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Since all defendants in this case are state or municipal officials, the requisites of

4. 42 U.S.C.A. § 1983 provides:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

section 1983 are satisfied upon a showing of the denial of a constitutional right.

[2, 3] Furthermore, the doctrine of pendent jurisdiction permits a consideration of the related state claims. The court below exercised its discretion to join the state claims, an action justified by the Supreme Court's decision in UMW v. Gibbs, 1966, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218:

> "Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *,' US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is *power* in federal courts to hear the whole."

See also Whirl v. Kern, 5 Cir. 1969, 407 F.2d 781, cert. denied, 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177. The federal claims here are substantial, and both the federal and state counts, grounded upon the incarceration and treatment of plaintiffs, arise out of "a common nucleus of operative fact." Jurisdiction being satisfied, we turn to the merits of the various allegations.

III.

Plaintiffs' first contention is that as a matter of law the trial court should have granted judgment on their claim that their treatment at Parchman constituted cruel and unusual punishment unlawful under federal and state law.

[4] The cruel and unusual punishment clause of the Eighth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment, Robinson v. California, 1962, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758, and thus a violation of its mandate may constitute a cause of action cognizable in federal court under section 1983. Wright v. McMann, 2 Cir. 1967, 387 F.2d 519: Jordan v. Fitzharris, N.D.Cal. 1966, 257 F.Supp. 674.

[5] Defendants' primary defense is that the matter of plaintiffs' treatment at Parchman was one of internal prison discipline, not reviewable by the courts. It is true that the federal courts entertain some reluctance to interfere with a prison's internal discipline. *See* Roy v. Wainwright, 5 Cir. 1969, 418 F.2d 231; Granville v. Hunt, 5 Cir. 1969, 411 F.2d 9, 12; Schack v. Florida, 5 Cir. 1968, 391 F.2d 593, cert. denied, 392 U.S. 916, 88 S.Ct. 2080, 20 L.Ed.2d 1376. This policy is based on the fear that judicial scrutiny of the decisions of prison officials would undermine the authority of those officials and is reinforced by the view that "lawful incarceration may properly operate to deprive the convict of certain rights which would otherwise be his to enjoy," Jackson v. Bishop, 8 Cir. 1968, 404 F.2d 571, 576. However, this chariness does not mean that prison officials have unfettered discretion in the treatment of their

prisoners. As then Circuit Judge Blackmun phrased it in Jackson v. Bishop, *supra*, 404 F.2d at 577:[5]

> "The federal courts, including this one, entertain a natural reluctance to interfere with a prison's internal discipline. This is true with respect to federal institutions, Glenn v. Ciccone, 370 F.2d 361, 363 (8 Cir. 1966); Sutton v. Settle, 302 F.2d 286, 288 (8 Cir. 1962), cert. denied, 372 U.S. 930, 83 S.Ct. 876, 9 L.Ed.2d 734; Garcia v. Steele, 193 F.2d 276, 278 (8 Cir. 1951); see Holland v. Ciccone, 386 F.2d 825 (8 Cir. 1967), cert. denied, 390 U.S. 1045, 88 S.Ct. 1646, 20 L.Ed.2d 307, as well as to state prisons, Douglas v. Sigler, 386 F.2d 684, 688 (8 Cir. 1967); Lee v. Tahash, 352 F.2d 970, 971 (8 Cir. 1965); Wright v. McMann, supra, 387 F.2d at 522.
>
> "However, the courts, including this one, have not hesitated to entertain petitions asserting violations of fundamental rights and, where indicated, to grant relief. In Glenn v. Ciccone, which we have just cited, this court clearly indicated that 'a factual showing of cruel and unusual punishment in violation of the Eighth

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5. This court has also sanctioned judicial intervention in compelling cases. Thus, in Jackson v. Godwin, 5 Cir. 1968, 400 F.2d 529, 532-533, we stated:

> "Acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court."

Similarly, in Schack v. Florida, supra, 391 F.2d at 594, we emphasized:

> "On the other hand, there may be cases where the deprivation of medical care will warrant judicial inquiry and action. Cf. Edwards v. Duncan, 4 Cir., 1966, 355 F.2d 993 (federal prisoner); Talley v. Stephens, E.D.Ark., 1965, 247 F.Supp. 683 (state prisoner).
>
> "We have couched the test in terms of an abuse of discretion on the part of federal prison officials. Thompson v. Blackwell, 5 Cir., 1967, 374 F.2d 945."

> Amendment' would support interference by a federal court. 370 F.2d at 363. We have made a like statement in many other cases. Carey v. Settle, 351 F.2d 483, 485 (8 Cir. 1965); Haynes v. Harris, 344 F.2d 463, 466 (8 Cir. 1965); Harris v. Settle, 322 F.2d 908, 910 (8 Cir. 1963), cert. denied 377 U.S. 910, 84 S.Ct. 1171, 12 L.Ed.2d 179. Although the Eighth Circuit cases just cited concern a federal institution, the principle, of course, has equal application to a state penitentiary. Wright v. McMann, supra, 387 F.2d at 522; Howard v. Smyth, 365 F.2d 428 (4 Cir. 1966), cert. denied, 385 U.S. 988, 87 S.Ct. 599, 17 L.Ed.2d 449."

We should be even more alert where one of the basic underpinnings of the "hands off" policy is absent. Incarceration after conviction is imposed to punish, to deter, and to rehabilitate the convict. *See* Rudolph v. Alabama, 1963, 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119 (Goldberg, J., dissenting). Some freedom to accomplish these ends must of necessity be afforded prison personnel. Conversely, where incarceration is imposed prior to conviction, deterrence, punishment, and retribution are not legitimate functions of the incarcerating officials. Their role is but a temporary holding operation, and their necessary freedom of action is concomitantly diminished.

Plaintiffs here were unconvicted misdemeanants held for bond. The purpose of incarceration of them was simply detention in order to assure presence at trial. Punitive measures in such a context are out of harmony with the presumption of innocence. Despite their pigmentation or political beliefs the accused here cannot be treated as though convicted of heinous crimes. In Butler v. Crumlish, E.D.Pa. 1964, 229 F.Supp. 565, 567, quoting Commonwealth v. Brines, 1920, 29 Pa.Dist. & Co.R. 1091, the court phrased the matter as follows:

> "It seems to be forgotten that an accused is not a convict, and that it is only strong necessity that compels his detention *before trial.* It is a restraint of the liberty of his person which is unavoidable. It certainly should not be aggravated by the infliction of any unnecessary indignity."

We must therefore review the cruel and unusual punishment allegations with the thought in mind that the treatment involved was inflicted upon persons not convicted of any crime.

[6] The cruel and unusual punishment clause is a nonstatic, moral precept designed to curb treatment which offends contemporary standards of decency. Until the early part of this century, the ban on cruel and unusual punishment had been interpreted to apply only to outrageous and barbarous practices. *See generally* Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773 (1970); Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv.L.Rev. 635 (1966). The concept has now expanded, but its precise boundaries are still unclear. Wilkerson v. Utah, 1878, 99 U.S. 130, 135-136, 25 L.Ed. 345 ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted. * * *"); Trop v. Dulles, 1958, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630. Courts have relied upon such imprecise measures as the protection of "the dignity of man," Trop v. Dulles, *supra,* 356 U.S. at 100, 78 S.Ct. 590, or "developing concepts of elemental decency," Jordan v. Fitzharris, *supra,* 257 F.Supp. at 679. In *Jordan* the court attempted to elucidate the scope of the concept:

> " 'What constitutes a cruel and unusual punishment has not been exactly decided.' Weems v. United

States, 217 U.S. 349, 368, 30 S.Ct. 544, 549, 54 L.Ed. 793 (1910). This statement is as true today as it was in 1910. It is possible, however, to identify three general approaches to the question. See Rudolph v. Alabama, 375 U.S. 889, 890-891, 84 S.Ct. 155, 11 L.Ed.2d 119 (1963), (dissenting opinion of Goldberg, J.). The first approach is to ask whether under all the circumstances the punishment in question is 'of such character * * * as to shock general conscience or to be intolerable to fundamental fairness.' Lee v. Tahash, supra, 352 F.2d at page 972. Such a judgment must be made in the light of developing concepts of elemental decency. Weems v. United States, supra, 217 U.S. at 378, 30 S.Ct. 544; Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (opinion of Warren, C. J.); Rudolph v. Alabama, supra, 375 U.S. at 890, 84 S.Ct. at 155 (dissenting opinion of Goldberg, J.). Secondly, a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. Weems v. United States, supra; Robinson v. State of California, supra, [370 U.S.] at 676, 82 S.Ct. 1417, 8 L.Ed.2d 758 (concurring opinion of Douglas, J.); Rudolph v. Alabama, supra, 375 U.S. at 891, 84 S.Ct. at 155 (dissenting opinion of Goldberg, J.). Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used. Weems v. United States, supra, 217 U.S. at 370, 30 S.Ct. 544; Robinson v. California, supra, 370 U.S. at 677, 82 S.Ct. 1417 (concurring opinion of Douglas, J.); Rudolph v. Alabama, supra, at 891, 84 S.Ct. at 155 (dissenting opinion of Goldberg, J.)."

257 F.Supp. at 679.

[7] Despite the subjective content of such notions, it is clearly accepted that the amendment prohibits certain hard core inhuman treatment. Trop v. Dulles, *supra,* 356 U.S. at 101, 78 S.Ct. 590. And, since Cooper v. Pate, 1964, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (per curiam), it has been clear that inmates have recourse to the amendment's protections through section 1983. *See generally* Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va.L.Rev. 795 (1969).

In this light we think that the undisputed treatment accorded plaintiffs in the maximum security unit at Parchman violated even those minimal "standards of decency" mandated in the treatment of convicted felons, Trop v. Dulles, *supra,* 356 U.S. at 100, 78 S.Ct. 590, much less the standards which must be afforded those as yet unconvicted of misdemeanor offenses. It would be well to quote in full that portion of the pre-trial stipulation relating to the treatment at Parchman:

> "The buses arrived at Parchman early Sunday morning October 3, 1965 and proceeded to the compound containing penitentiary's Maximum Security Unit. The maximum security building has two wings, each divided into two cell blocks with 13 cells each, for a total of 52 cells. One of the four cell blocks, containing 13 cells is Parchman's 'Death Row'. Each cell contained two steel bunk beds, a toilet and a wash basin. Three of the cell blocks, excluding Death Row, containing a total of 39 cells, had been vacated to receive the Natchez prisoners.
>
> "The men prisoners, including all the male plaintiffs that had been arrested on Saturday were required to strip naked and consume a quantity of laxative. They were inspected and searched. The men were

then placed in cells. The female prisoners, including all the female plaintiffs that had been arrested on Saturday were required to remove their shoes, stockings, sweaters, coats, jewelry and wigs, but not their undergarments, dresses, blouses, and pants, and were searched by female employees and trustees. They also were given a quantity of laxative. The women were then placed in cells. The prisoners were segregated by sex but not race. No one was permitted to carry any personal belongings into their cells including medicines and sanitary napkins. * * *

"Prior to release of the prisoners, many, including many of the plaintiffs, had blood samples taken from them."

These admitted facts standing alone come within the rationale of a number of cases which have found a violation of the Eighth Amendment. The situation becomes even more aggravated by additional undisputed facts, including forced nudity of some of plaintiffs for up to 36 hours, inadequate hygienic facilities, an absence of bedding, cramped, cold quarters and physical and mental abuse. On similar facts, but involving convicted inmates, the court in Knuckles v. Prasse, E.D.Pa. 1969, 302 F.Supp. 1036, held cruel and unusual a period of detention of 2½ days in cramped quarters, without clothing or bedding, and without toilet articles:

"Finally, there is the question of the two and one-half days spent by the plaintiffs, two to a cell—six feet by nine feet, eleven inches. The cells had no windows and no artifical light. Each cell had only a single bed and the cells were damp and foul smelling from water splashing on the floors as a result of malfunctioning toilets. The men were given no clothing or bedding, save two blankets, which had to be used to absorb

water from the overflowing toilet and further as a mattress. The men were given no soap, no towels, no toilet tissue, no toilet articles.

"The conditions were somewhat less severe but still quite similar to those described by the court in Wright v. McMann, 2 Cir., 387 F.2d 519. There the solitary confinement cell was described as 'dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue * * *'. The plaintiff was kept completely nude for eleven days and was denied all hygienic implements and utensils.

"While petitioners here were faced with a damp cell and not a freezing one, and while there were no physical beatings and the period of confinement in question was two and one-half days and not eleven days, still I fully concur with the view of Judge Kaufman in the Wright v. McMann case * * *." 302 F.Supp. at 1061-1062.

In Wright v. McMann, *supra*, the court condemned the use of a "strip cell," once again utilized against convicted inmates:

"We are of the view that civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper. The subhuman conditions alleged by Wright to exist in the 'strip cell' at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency.

> Trop v. Dulles, 356 U.S. 86, 100, 101, 78 S.Ct. 590, 597, 598, 2 L.Ed.2d 630 (1958)." 387 F.2d at 526.

See also Sostre v. Rockefeller, S.D.N.Y. 1970, 312 F.Supp. 863; Jordan v. Fitzharris, *supra*.

Likewise the treatment to which the plaintiffs here were subjected not only violates "developing concepts of elemental decency," but also is "greatly disproportionate to the offense for which it is imposed." Jordan v. Fitzharris, *supra*, 257 F.Supp. at 679. Like Cain, these plaintiffs bear the stigma of having served in the penitentiary for violating a misdemeanor ordinance besotted with constitutional infirmities. They were not felonious terrorists or hardened recidivists—the treatment in the maximum security unit was totally unfounded. If similar treatment for convicted prisoners is universally condemned, which it is, that treatment has no place here. We deal with human beings, not dumb, driven cattle.

We think the language of the court in Hancock v. Avery, M.D.Tenn.1969, 301 F.Supp. 786, is particularly instructive:

> "Applying both of these tests to the instant case, the Court finds that the effect of confining plaintiff in the dry cell under the conditions shown to have existed was to subject him to cruel and unusual punishment in violation of the Eighth Amendment. The conditions of his dry cell confinement are such as to make it evident that fundamental concepts of decency did not prevail. Particularly barbaric are the facts that plaintiff is forced to sleep in the nude on a bare concrete floor without even the comfort of a blanket and that he is deprived at all times of adequate light and ventilation. Equally offensive is the fact that he is provided with no means by which he can maintain

his personal cleanliness, with the result that he is forced to live and eat under animal-like conditions. The debasing conditions to which plaintiff is subjected offend more than some mere "fastidious squeamishness or private sentimentalism." Rochin v. People of California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). It is clear that requiring a prisoner to live, eat and sleep in such degrading circumstances does violence to civilized standards of human decency. Wright v. McMann, *supra; Jordan* v. Fitzharris, *supra.*

"It is also apparent that the dry cell punishment, as administered in the instant case, is unnecessarily cruel in view of the purpose for which it is used. The stated aims in confining plaintiff in the dry cell were to protect him from self-inflicted injury,[1] to protect the general prison population and personnel from violent acts on his part, and to prevent his escape. Solitary confinement for the purpose of achieving such goals is not per se an unconstitutional form of punishment. Graham v. Willingham, *supra,* [384 F.2d 367, (10 Cir.)]. However, the Court is of the opinion that such goals can be attained without requiring a prisoner to live in the exacerbated conditions of filth and discomfort demonstrated in the instant case. Where prison officials impose such deplorable living conditions in conjunction with solitary confinement, the Court is compelled to find that cruel and unusual punishment has been imposed in violation of the Constitution.

"While it is true, as the defendants assert, that all imprisonment is to an extent inhumane, this fact does not excuse the imposition of forms of punishment so harsh as to violate basic standards of human decency." 301 F.Supp. at 791-792.

[8] Defendants have offered no real justification for the treatment imposed at Parchman other than to contend that the treatment was merely the standard operating procedure for the maximum security unit.[6] But since we hold that procedure unlawful, defendants cannot escape liability because they customarily indulged in such illegal actions. We therefore hold that plaintiffs should be granted judgment as a matter of law on liability under section 1983 since the treatment imposed at Parchman was violative of the Eighth Amendment.

[9, 10] Similarly, liability should be imposed under the pendent state claims, for Mississippi recognizes that its prisoners must be afforded civilized treatment. Thus, the general common law duty of the custodian of a prisoner to take proper care of him is specifically imposed on the penitentiary superintendent in Mississippi by statute. Miss.Code Ann. § 7930 (Supp.1968).[7] *See generally* Roberts v. Williams, N.D. Miss.1969, 302 F.Supp. 972, 985-986. The force of this rule is even stronger where a person not convicted but merely detained pending posting of bond is concerned. *See* Farmer v. State, Miss.1955,, 79 So.2d 528. Mississippi law simply would not tolerate the inhuman

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6. Defendants do argue that the blood tests were medically justifiable because of the prevalence of venereal disease in certain of the plaintiffs. Assuming arguendo that such a justification would validate the indiscriminate taking of blood samples demonstrated here, it is clear from the record that Breazeale's assertion of this justification was held inadmissible.

7. § 7930. Management and control of prison system to be vested in superintendent.

The superintendent, hereinafter provided for, shall be vested with the exclusive management and control of the prison system, and all properties belonging thereto, subject only to the limitations of this act and shall be responsible for the management of affairs of the prison system and for the proper care, treatment, feeding, clothing and management of the prisoners, confined therein. The superintendent shall have sole authority to employ and discharge employees.

See also Miss.Code Ann. §§ 7921, 7932 (Supp.1968); cf. Miss.Code Ann. § 7915 (Supp.1968).

treatment accorded plaintiffs at Parchman. We therefore find that plaintiffs should be granted judgment on liability as a matter of law on their pendent state claims.

IV.

[11] Plaintiffs next allege that the course of events which transpired in October, 1965, constitute federal and state causes of action for false imprisonment. While such an action rests basically in tort, usually the province of state law, it is now clear that false imprisonment can be the type of "constitutional tort" cognizable under section 1983. *See* Whirl v. Kern, *supra*. We therefore turn to the various grounds which plaintiffs contend require a finding of false imprisonment as a matter of federal and state law.

A. False Arrest

Plaintiffs contend that their arrest for parading without a permit is actionable because the ordinance under which the arrests were made was unconstitutional. The Natchez parade ordinance made it "unlawful for any person or persons without the written permission of the Chief of Police of the City of Natchez * * * to conduct or participate in any parade or marching" on the city streets or sidewalks. Such an ordinance was plainly unconstitutional. *See, e. g.*, Hague v. CIO, 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Cox v. Louisiana, 1965, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471, but the particular Natchez enactment had not been considered judicially at the time the plaintiffs were arrested. *See generally* Guyot v. Pierce, 5 Cir. 1967, 372 F.2d 658.

Plaintiffs' claim that the police officers' conduct constituted false arrest as a matter of federal law is governed by the Supreme Court's decision in Pierson v. Ray, 1967,

386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. There the Court held that a police officer could not be held liable under section 1983 for false arrest because of an unconstitutional statute if he acted with probable cause and with a good faith belief in the validity of the statute. The Court stated:

> "The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts § 121 (1965); 1 Harper & James, The Law of Torts § 3.18, at 277-278 (1956); [State of Missouri ex rel. and to Use of] Ward v. Fidelity & Deposit Co. of Maryland, 179 F.2d 327 (C.A.8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied. * * *
>
> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. * * *" 386 U.S. at 555, 557, 87 S.Ct. at 1218, 1219 (footnotes omitted).

[12, 13] Plaintiffs argue that the police officers could not have reasonably believed the ordinance in question was constitutional. It is true that numerous judicial decisions prior to 1965 had made it clear that statutes which conferred unbridled discretion upon a public official to grant or deny the exercise of expressive activity were invalid. Simple unawareness of the names and dates of those relevant decisions would not confer immunity. We do not think, however, that the facts of this case warrant finding as a matter of law that Robinson knew of the unconstitutionality of the ordinance. The *Pierson* test is a subjective one, which of necessity raises questions of credibility, usually within the province of the jury. Here there was testimony from Robinson that he believed he was doing his duty as a peace officer in arresting plaintiffs. While the status of constitutional development is a relevant countervailing consideration, at the time of the occurrences at issue here, there was no judicial decision from either this court or the Mississippi state courts explicitly ruling on either the Natchez or identical ordinances. *See* Guyot v. Pierce, *supra;* King v. City of Clarksdale, Miss. 1966, 186 So.2d 228. We therefore think that there was sufficient evidence to raise an issue of the *Pierson* defense. The court below submitted this issue under proper instructions, and we are thus bound by the jury determination of no liability.

A similar result obtains under the pendent state claim for Mississippi follows the *Pierson* rule, which is itself grounded in the common law. *See* Golden v. Thompson, Miss. 1943, 11 So.2d 906.[8] We therefore af-

8. Plaintiffs argue that even if Chief Robinson established a *Pierson* defense, officers Rickard, Cowart, and Beach, who participated in the arrests, still are liable for they offered no testimony at trial. We reject this contention. These officers were simply following the orders of Chief Robinson so that his immunity should extend to them.

firm the verdict below which found that defendants are immune from liability for false arrest.

B. Failure to Take Plaintiffs Before a Magistrate

The record clearly reveals that defendants neither took any of plaintiffs before a judicial officer nor made any attempt to do so. Plaintiffs thus argue that even if the initial arrest was valid under *Pierson*, the subsequent incarceration is actionable. While the law does not exact constitutional erudition from those unschooled in jurisprudence, plaintiffs contend that we must compel respect for individual liberty to the extent of requiring officials to follow procedures clearly delineated by statutory or common law mandates. In such a situation, plaintiffs argue, the "good faith" defense of *Pierson* is inapplicable. *See* Whirl v. Kern, *supra*.

[14] It is true that unreasonable or unnecessary delay in bringing a prisoner before a magistrate, despite good faith, may give rise to an action for false imprisonment. Cooley v. Stone, 1969, 134 U.S.App.D.C. 317, 414 F.2d 1213; Czap v. Marshall, 7 Cir. 1963, 315 F.2d 766, cert. denied, 375 U.S. 942, 84 S.Ct. 348, 11 L.Ed.2d 273; Moran v. City of Beckley, 4 Cir. 1933, 67 F.2d 161; Fulford v. O'Connor, 1954, 3 Ill. 490, 121 N.E..2d 767; 35 C.J.S. False Imprisonment § 30. The cause of action arises from the uniform requirement, both state and federal, of prompt presentation before a magistrate. *See, e. g.*, Fed.R.Crim.P. 5(a), *as construed in* Mallory v. United States, 1957, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479; Czap v. Marshall, *supra*, 315 F.2d at 770.

[15] Nevertheless, we hold that plaintiffs have failed to state a cause of action under section 1983, for they have not demonstrated a violation of their constitutional

rights. As we said in Kulyk v. United States, 5 Cir., 1969, 414 F.2d 139, 141-142, "[t]he right under the federal rules to be promptly taken before a magistrate has not been given constitutional status and has not been applied to persons in state custody." *See also* Edwards v. Holman, 5 Cir. 1965, 342 F.2d 679, cert. denied, 384 U.S. 1017, 86 S.Ct. 1934, 16 L.Ed.2d 1039. Similarly, even though the failure to take plaintiffs before a magistrate violates Mississippi law, it does not rise to the status of a denial of due process. Scarbrough v. Dutton, 5 Cir. 1968, 393 F.2d 6; Baxter v. Rhay, 9 Cir. 1959, 268 F.2d 40; United States ex rel. Weber v. Ragen, 7 Cir. 1949, 176 F.2d 579, cert. dismissed, 338 U.S. 809, 70 S.Ct. 49, 94 L.Ed. 489. *But see* Goodwin v. Page, E.D.Okl.1969, 296 F.Supp. 1205, aff'd on other grounds, 10 Cir., 418 F.2d 867. Plaintiffs' federal allegations therefore must fall.

[16] The same result does not obtain, however, under plaintiffs' pendent state claim. Mississippi law clearly holds that delay in bringing a prisoner before a magistrate may give rise to an action for false imprisonment. Dunning v. State, 1965, 251 Miss. 766, 171 So.2d 315, cert. denied, 386 U.S. 993, 87 S.Ct. 1310, 18 L.Ed.2d 339; Sheffield v. Reece, 1947, 201 Miss. 133, 28 So.2d 745; Anderson v. Beck, 1886, 64 Miss. 113, 8 So. 167. By statute "every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case." Miss.Code Ann. § 2473. What constitutes unreasonable or unnecessary delay, of course, must be determined from the facts and circumstances of each case. *See* Czap v. Marshall, *supra.*

[17, 18] Defendants have attempted to meet their burden of justification by arguing that the failure was reasonable due to the large number of arrests, the week-

end days on which the arrests were made, and the availability of a bonding procedure.[9] However, defendants have not demonstrated that these factors either frustrated any attempt to secure a magistrate or negated the obligation to do so. It is true that a number of those arrested were apparently permitted to make bond and thus to secure their release. As to those prisoners, many of the compelling reasons recognized by Mississippi law for immediate presentation for inquiry into the merits of the accusation disappear. But the Mississippi courts clearly hold that the theoretical availability of a bonding procedure does not immunize the incarceration of those arrested who either cannot make bond immediately or who were not permitted to do so. The sterile opportunity to make bond does not abate the right to a magistratical confrontation. *See* Sheffield v. Reece, *supra*, 28 So.2d at 746. It was the duty of the Natchez authorities to attempt to bring those who did not execute bond before a magistrate, rather than to herd them pell mell off to Parchman. Nor was this duty relinquished by the mere fact that there was a large number of arrests on a weekend. Mass arrests may create problems for the arresting officers, but the officers must make a reasonable effort to meet those problems in order to avoid the charge of "unnecessary delay." There is nothing in this record to demonstrate that an unsuccessful attempt was made to secure a magistrate for any of the plaintiffs. In fact the record shows that no attempt was made. Similarly, we cannot hold that Mississippi would consider that its laws

9. Defendants also argue that plaintiffs' counsel removed their cases to federal court on Monday, October 4, so that the prisoners were no longer the responsibility of the state officials. See 28 U.S.C.A. § 1446(f). A review of the record clearly shows, however, that in fact there was no removal which would have relieved state officials of their state law obligation to bring plaintiffs before a magistrate.

are so Sabatized that they are automatically suspended over the weekend. *Cf.* Sheffield v. Reece *supra*, 28 So.2d at 748-749. The case might be different if it were shown that a magistrate was unavailable, but no such showing was made here. Indeed it is questionable whether such a showing could have been made. Magistrates in Mississippi have authority to hear cases on both Saturday and Sunday. *See* Sheffield v. Reece, *supra*, 28 So.2d at 748. And there is no justification whatsoever for failure to bring those still incarcerated before a magistrate on Monday, October 4, which was the next date scheduled for a regular session of the local police court. On the basis of these undisputed facts, we hold that plaintiffs' state rights were violated. Judgment is therefore rendered for plaintiffs on liability as a matter of law.

[19] Plaintiffs have raised other claims which, they contend, also compel a finding of liability for false imprisonment.[10] These claims do not rise to constitutional dimensions so that we must affirm judgment for defendants under section 1983. We also decline plaintiffs' invitation to nevertheless engage in the complexities surrounding the construction of these numerous Mississippi statutes under our pendent jurisdiction, for we find that plaintiffs' allegations simply constitute cumulative grounds which are subsumed under our basic finding of liability for false imprisonment lodged upon the failure to bring plaintiffs before a magistrate. *See* UMW v. Gibbs, *supra*, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d 218 ("Need-

10. Thus, plaintiffs contend that minor plaintiffs were falsely imprisoned because of defendants' failure to follow the procedures of Mississippi's Youth Court Act. See note 3 supra. Likewise, plaintiffs argue that they were falsely imprisoned because their transfer to Parchman by the municipal authorities was in violation of Miss.Code Ann. § 3374-135 (Supp. 1968), which specifies the procedures to be followed in transferring municipal prisoners to the state penitentiary.

less decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law").

V.

We come now to the question of the responsibility of the individual defendants in light of our holding that plaintiffs should be granted judgment on liability (1) under state law for failure to bring them before a magistrate, and (2) under federal and state law for infliction of cruel and unusual punishment at Parchman.

Plaintiffs argue that each defendant is liable for the entire wrong. Robinson, assisted by Rickard, Cowart, Beach, Flowers, and Cameron, was in charge of the detention in Natchez and was responsible for the failure to attempt to secure a magistrate. These defendants also were responsible for the delivery of the prisoners to highway patrolmen, under the statutory supervision and control of Birdsong, for transportation to Parchman. There, highway patrolmen and Natchez firemen acting under orders of Robinson and Cameron assisted in processing and detaining plaintiffs. Finally, Breazeale supervised the detention at the penitentiary and directed the manner of treatment in the maximum security unit. Nosser, while opposed to these actions, failed to act despite his position as mayor of the community.

Defendants, on the other hand, would have us attenuate responsibility. But to follow defendants' logic to its extreme would result in the total exculpation of defendants despite their participation in a chain of events which we have found to be illegal and unjustified.

We instead begin by emphasizing that section 1983 "should be read against the background of tort liability

that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, *supra*, 365 U.S. at 187, 81 S.Ct. at 484, 5 L.Ed.2d 492; Whirl v. Kern, *supra*. The pendent state grounds incorporate the similar rule of Mississippi. *See* Smith v. Patterson, Miss.1952, 214 Miss. 87, 58 So.2d 64; Bacon v. Bacon, Miss.1899, 76 Miss. 458, 24 So. 968. This general rule of liability provides that "all those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him." W. Prosser, Law of Torts 59 (3d ed. 1964). So long as there is "an intent to bring about a result which will invade the interests of another in a way that the law will not sanction" good faith is no defense. *Id.* at 31; *see* Whirl v. Kern, *supra*; State for Use of Powell v. Moore, 1965, 252 Miss. 471, 174 So.2d 352.

[20] In view of these principles we think that the conduct involved here must be viewed as a continuum, beginning with the illegal incarceration for failure to bring plaintiffs before a magistrate and ending with inhuman treatment at Parchman. Each incident flowed proximately and naturally into the other so that each defendant who played "a substantial role in bringing about the results" is liable jointly and severally for the entire injury and wrong. *See* Nesmith v. Alford, 5 Cir. 1963, 318 F.2d 110, 119, cert. denied, 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420. Thus, Chief Robinson and police officers Rickard, Cowart, Beach, and Flowers[11] played substantial roles in

11. These officers, of course, were acting under the orders of Chief Robinson. Nevertheless

"An inferior officer or deputy is personally liable for any misconduct of which he may be guilty in making or causing a wrongful arrest or detention, that the arresting officer is acting under orders or directions of his superiors ordinarily being no defense * * *." 35 C.J.S. False Imprisonment § 42, at 703; see Nesmith v. Alford, supra.

detaining plaintiffs, denying them access to a magistrate, and transporting them to Parchman where they would be subjected to maximum security treatment. Fire Chief Cameron assisted these police officers in the detention and ordered Natchez firemen both to escort the buses to Parchman and to remain at the penitentiary for the duration of the incarceration. Finally, Breazeale supervised and directed the treatment and detention at Parchman. This was a typical "chain of command" situation. As we said in *Nesmith*:

> "As to the issue of individual liability, each of the three defendants—Sullivan, Ruppenthal and Alford—acted as one. Although there was no prior plan devised to bring about the arrest and imprisonment of the plaintiffs, each of the three had a substantial role in bringing about the results. This was an instance of the typical 'chain of command,' Sullivan indicating to Ruppenthal that the Plaintiffs should be removed from the cafe, Ruppenthal giving the authoritative commands constituting the arrest, and Alford providing the essential transportation at the direction of Ruppenthal. Their actions throughout the whole sequences of events are so intertwined and interlocking that these Defendants must fall together." 318 F.2d at 119.

[21] On the other hand, we must sustain the findings of no liability on the part of Mayor Nosser and Commissioner of Public Safety Birdsong. Plaintiffs argue that Mayor Nosser, upon learning of the occurrences in Natchez, either should have called a special meeting of the Board of Aldermen in order to try to persuade them to rescind the transferral to Parchman or should have attempted to persuade Breazeale to release the prisoners. However, we do not think that Mayor Nosser's failure to

act renders him liable. The record reveals that Nosser learned of what was happening only on Sunday, October 5, and at that time made it clear that he opposed the conduct of the defendants. There is no evidence that he could have called together a quorum of the Board of Aldermen speedily or that, once called, his point of view would have prevailed. Indeed, the evidence is to the contrary. Three of the six aldermen, in addition to the named defendants, directly or indirectly participated in the events at the heart of this case. Without the support of the Board, the Mayor was powerless to halt the course of events since his municipal powers were circumscribed. In such a situation, we do not find that Nosser had a duty to act under penalty of damages. *See* W. Prosser, *supra*, at 338-39. He cannot be required to do an act which would have been useless or ineffective.

It was stipulated that Commissioner Birdsong was charged by law with the duty of supervision and control of all Mississippi Highway Safety Patrolmen.[12] However, there is no evidence that he participated in, had knowledge of, or was negligent with regard to the actions of the highway patrolmen who assisted in the detention and transportation of plaintiffs. Lower courts have uniformly held that

> "[t]he chief of police would not be responsible for the wrongful acts of the officer unless he was present or unless it is shown he directed such acts or personally cooperated in them * * *." Jordan v. Kelly, W.D.Mo. 1963, 223 F.Supp. 731, 739.

12. See Miss.Code Ann. § 8078 (Supp. 1968). In actuality this section provides that another official, the "Chief of Patrol," shall have authority over the "division of operations of the patrol." While the Commissioner has authority to employ members of the patrol, *id.* § 8079, in most instances he does not have the power of dismissal. *Id.* § 8081.

Accord, Burnett v. Short, S.D.Tex.1970, 311 F.Supp. 586; Snaberg v. Daley, N.D.Ill.1969, 306 F.Supp. 277; Mack v. Lewis, S.D.Ga.1969, 298 F.Supp. 1351; Patrum v. Martin, W.D.Ky.1968, 292 F.Supp. 370; Pritchard v. Downie, E.D.Ark.1963, 216 F.Supp. 621, aff'd on other grounds, 8 Cir., 326 F.2d 323; *cf.* Robertson v. Sichel, 1888, 127 U.S. 507, 8 S.Ct. 1286, 32 L.Ed. 203. We think that on the facts of this case this rule is equally applicable to defendant Birdsong and requires a finding of no liability on his part.[13]

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13. We emphasize that this holding with regard to the non-liability of defendant Birdsong is limited to the facts of this case and may not be applicable to other officials. For example, both the common law and judicial decisions under the federal civil rights acts seemingly recognize a broader liability on the part of sheriffs and wardens. See, e. g., Bethea v. Crouse, 10 Cir. 1969, 417 F.2d 504, 507 n. 2; Whirl v. Kern, supra, 407 F.2d at 795-796; Talley v. Stephens, E.D.Ark.1956, 247 F.Supp. 683, 692; Note, Tort Liability of Law Enforcement Officers: State Remedies, 24 La.L.Rev. 130 (1968); 80 C.J.S. Sheriffs and Constables §§ 52, 55, 117. Likewise, we do not decide whether the doctrine of *respondeat superior* has vitality in a suit under section 1983. Compare Nugent v. Sheppard, N.D.Ind.1970, 318 F.Supp. 314, 315 (doctrine does not apply), Sanberg v. Daley, supra, 306 F.Supp. at 278 (same), Roberts v. Williams, supra, 302 F.Supp. at 987 (same), with Hill v. Toll, E.D.Pa.1970, 320 F.Supp. 185 (doctrine applies). See also Nesmith v. Alford, supra, 318 F.2d at 126; Runnels v. Parker, C.D.Cal.1967, 263 F.Supp. 271; 35 C.J.S. False Imprisonment § 42. As the court in *Jordan* impliedly noted, many of the factors upon which *respondeat superior* is based are absent when dealing with police supervisors:

> "We come next to the question of the liability of the defendant Chief of Police. The decisions are not in harmony as to the exact scope of the liability of sheriffs, constables, marshals or other peace officers for acts of their deputies. There is a difference of judicial opinion in the various states. This is the result, to some extent, of statutory provisions and also the question as to whether or not the deputies are acting by virtue of their office and acts done under color of office. 47 Am.Jur. 158; Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St.Rep. 123; State to Use of Russell et ux. v. Moore et al., 19 Mo. 369; State of Mo. ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of N. Y., 8 Cir., 107 F.2d 343.
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> "The rule is different however, with respect to the Chief of Police of a municipal police department. Even though he may be charged with the duty of selecting the members of the force, he is not responsible for their acts unless he has directed such acts to be done, or has personally cooperated in the offense, for each police officer, is like himself, a public

We therefore find that defendants Nosser and Birdsong may not be held liable under the facts of this case.

Defendants would have us extend this finding of non-liability by arguing that they are protected by the doctrine of official immunity from damages. *See generally*

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servant. Casey v. Scott, 82 Ark. 362, 101 S.W. 1152, 118 Am.St.Rep. 80, 12 Ann.Cas. 184; Baisley v. Henry, 55 Cal.App. 760, 204 P. 399; Michel v. Smith, 188 Cal. 199, 205 P. 113, 12 A.L.R. 980, 34 A.L.R. 561; Pritchard v. Downie, 216 F.Supp. 621 (E.D.Ark., 1963).

* * *

"Another case in which the liability of the chief of police for the acts of the deputy or police officer was discussed, is Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A.L.R. 561. There the court stated:

" 'But the courts have very generally drawn a distinction between a sheriff and a chief of police, holding that the deputies of the former are selected by the sheriff and act purely as his representatives, but that police officers are generally not selected exclusively by the chief of police, and are themselves officers and do not act for the chief of police in the performance of their official duties.'

"Casey v. Scott, supra, 82 Ark. 362, 101 S.W. 1152 (Ark.) also involved the question of liability of a chief of police for his police officers. There the court stated:

" 'A sheriff is responsible for his deputies, for they are acting in his private service in his name and stead, and are only public officers through him. A chief of police may select a police force, but he is not responsible for their acts, as each policeman is a public servant himself. So under this ordinance, the dog catcher was a public servant selected by the chief of police just as a patrolman would be selected by him, or a mayor or other appointing power. There is no liability in such cases, unless the appointing officer fails to exercise reasonable care in the selection of the appointee—a question not presented here.'

"Very clearly the general rule with respect to the liability of a chief of police applies to this case. The statutes clearly require that the officers of the police force of Kansas City be selected by the chief of police from a list of those who have qualified pursuant to an examination, and the chief of police is required under the law to make all selections from that list, and such officers are in no sense the personal appointees of the chief of police.

"The police officers are public officials just as the chief of police is a public official, and their duties are prescribed by the authority under which their positions are created."

Jordan v. Kelly, supra, 223 F.Supp. at 737-739.

Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv.L.Rev. 209 (1963); Note, The Doctrine of Official Immunity Under the Civil Rights Act, 68 Harv.L.Rev. 1229 (1955). In Norton v. McShane, 5 Cir. 1964, 332 F.2d 855, cert. denied, 380 U.S. 981, 85 S.Ct 1345, 14 L.Ed.2d 274, we found that various federal executive officials were immune from tort liability under federal common law, where they "were acting within the scope of their authority or in the discharge of their duties." *See also* United States v. Faneca, 5 Cir. 1964, 332 F.2d 872. We were careful to point out, however, that the immunity doctrine might be different with regard both to common law actions against state officials, governed by state law, 332 F.2d at 860 n. 6, and to civil rights suits against state officials, governed by section 1983:

> "Up to this time we have not referred to cases brought under the Civil Rights Acts, such as Lewis v. Brautigam, 5 Cir. 1955, 227 F.2d 124, 55 A.L.R.2d 505. The question involved in these cases is the extent, if any, to which the Civil Rights Acts have abrogated the immunity doctrine. While it is clear that the common-law immunity afforded legislative and judicial officers applies in suits under the Civil Rights Acts, there remains much uncertainty as to the extent to which immunity for subordinate executive officials applies, if it applies at all. In view of our conclusion later in this opinion that the instant suits are not within the purview of the Civil Rights Acts, we do not decide at this time the scope of official immunity under those statutes. We need only say that the doctrine may be given more limited application in those suits than it has been given at common law." 332 F.2d at 860-861.

While official immunity has been extended under section 1983 to legislative and judicial officers, Pierson v. Ray, *supra;* Tenney v. Brandhove, 1951, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019; Martone v. McKeithen, 5 Cir. 1969, 413 F.2d 1373, there has been a reluctance to stretch the doctrine too far, as was well expressed in Jobson v. Henne, 2 Cir. 1966, 355 F.2d 129, 133-134 (Footnotes omitted):

> "Thus we reach the question whether these defendants by reason of their offices should be immune from the tort liability imposed by § 1983. The Civil Rights Acts in general, and § 1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar. Nevertheless, courts have narrowed the scope of these provisions by applying certain common law notions of official immunity from suit; it is now clear, for example, that the common law immunity from suit afforded legislative and judicial officers continues to have force in suits brought under the Civil Rights provisions. See generally, Note, The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv.L.Rev. 1229 (1955).
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> "It should be equally clear that both the language and the purpose of the Civil Rights Acts are inconsistent with the application of common law notions of official immunity in all suits brought under these provisions. See Norton v. McShane, 332 F.2d 855, 861 (5 Cir. 1964) cert. denied, 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274 (1965). In suits brought under § 1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted "under color of any statute, ordinance, regulation, custom, or usage, of any State * * *." 42 U.S.C. § 1983. This test can rarely be satisfied in the case

of anyone other than a state official. See Collins v. Hardyman, 341 U.S. 651, 662, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). To hold that all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits brought under state law "would practically constitute a judicial repeal of the Civil Rights Acts." Hoffman v. Halden, 268 F.2d 280, 300 (9 Cir. 1959). Furthermore, and perhaps more basically, the purpose of § 1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under § 1983. Cf. Robichaud v. Ronan, 351 F.2d 533 (9 Cir.1965)."

[22, 23] In the present case there can be no question of official immunity. The Mississippi common law recognizes no immunity for sheriffs, wardens, police officers, or firemen charged with false imprisonment or tortious treatment of prisoners. *See, e. g.,* Sheffield v. Reece, *supra*; Farmer v. State, *supra*; State for Use of Powell v. Moore, *supra*; Vice v. Holley, 1906, 88 Miss. 572, 41 So. 7. Likewise, there is no immunity for these officials under section 1983. *E. g.*, Whirl v. Kern, *supra* (sheriff); Joseph v. Rowlen, 7 Cir. 1968, 402 F.2d 367 (police officers); Cohen v. Norris, 9 Cir. 1962, 300 F.2d 24 (same); Wright v. McMann, *supra* (warden); Sostre v. Rockefeller, *supra* (same); Roberts v. Williams, *supra* (same); Beauregard v. Wingard, S.D.Cal.1964, 230 F.Supp. 167, 174 (same); *see* Monroe v. Pape, *supra;* Nesmith v. Alford, *supra.*

In conclusion, we have found that plaintiffs should be granted judgment as to liability (1) under section 1983 for

cruel and unusual punishment and (2) under Mississippi state law for false imprisonment and mistreatment at Parchman. We hold that under the federal section 1983 claim defendants Robinson, Rickard, Cowart, Beach, Flowers, Cameron, and Breazeale are liable jointly and severally for the damages flowing from the illegal treatment at Parchman. Under the pendent state claims these defendants are liable jointly and severally for the damages flowing from the illegal incarceration following the arrests and the resulting treatment at Parchman. Judgment is reversed and rendered as to liability, leaving open for trial the question of damages, compensatory and punitive.

VI.

Plaintiffs finally urge us to reverse the trial court's dismissal of the action prior to trial, with prejudice, as to 26 of the initial plaintiffs. This dismissal was ordered because of failure to answer written interrogatories propounded by defendants under Fed.R.Civ.P. 33.

Fed.R.Civ.P. 37, as it read in 1969,[14] provided several sanctions for failure to make discovery, including dismissal

14. Rule 37 provided in part:

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

of the action. The trial court based its dismissal either on

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * *

(d) Failure of Party to Attend or Serve Answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Rule 37 was revised in 1970 to read in relevant particulars as follows:

(b) Failure to comply with order.

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Rule 37(b) (2) (iii) or on 37(d). The validity of this action must be measured against the test set forth in Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 1958, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255, and reiterated by us in such cases as Dorsey v. Academy Moving & Storage, Inc., 5 Cir. 1970, 423 F.2d 858; B. F. Goodrich Tire Co. v. Lyster, 5 Cir. 1964, 328 F.2d 411, and Read v. Ulmer, 5 Cir. 1962, 308 F.2d 915. *See also* 4 J. Moore, Federal Practice ¶ 37.03 [2.-1], [2.-5] (1970). In *Dorsey*, Judge Wisdom stated the following test:

> "The sanctions available under Rule 37(b) for such conduct are predicated upon the presence of such factors as willful disobedience, gross indifference to the

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(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

* * *

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

right of the adverse party, deliberate callousness, or gross negligence. The sanctions are not predicated upon a party's failure to satisfy fully the requirements of a production order when the failure 'was due to inability fostered neither by its own conduct nor by circumstances within its control'. Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, 1958, 357 U.S. 197, 211, 78 S.Ct. 1087, 1095, 2 L.Ed.2d 1255, 1266.

"[The Rule] should not be construed to authorize dismissal * * * because of * * * noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. 357 U.S. at 212, 78 S.Ct. at 1096.

"The rule is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions. The court, however, should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior. B. F. Goodrich Tire Co. v. Lyster, 5 Cir. 1964, 328 F.2d 411; see 4 J. Moore, Federal Practice § 37.03 (1969)." 423 F.2d at 860-61

See also Bon Air Hotel, Inc. v. Time, Inc., 5 Cir. 1967, 376 F.2d 118, 121, cert. denied, 393 U.S. 815, 89 S.Ct. 225, 21 L.Ed.2d 179 ("The dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances").

[24] We hold that the trial court erred in dismissing the action as to the 26 plaintiffs. The court made no finding of "willful disobedience," "gross indifference," or "deliberate callousness," and we can find no evidence of such. The record shows that while this action was commenced in

1966 by over 150 plaintiffs, the defendants took no discovery whatsoever until April 7, 1969, less than two months prior to trial. Defendants then submitted to each plaintiff 37 interrogatories and numerous subquestions, including several irrelevant questions which were stricken by the court after the plaintiffs moved for a protective order. Plaintiffs were ordered to answer the remaining interrogatories by May 22, which date was extended 24 hours. The record reveals that counsel made a good faith effort to secure the required answers, but simply ran out of time. Plaintiffs' counsel were able to compile over 300 pages of discovery, but simply were unable to contact all plaintiffs in such a short time, especially since many of plaintiffs had moved from Natchez after the passage of 3 years. Some milder sanction might have been appropriate for failure to answer, *see* Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers, *supra*, 357 U.S. at 208, 78 S.Ct. 1087. However, considering the large number of plaintiffs, the length of the interrogatories, and the dilatoriness on the part of defendants, *cf.* B. F. Goodrich Tire Co. v. Lyster, *supra*, we think the drastic remedy applied here was unjustified.

We do not intend that plaintiffs should profit from failure to respond to discovery. Our determinations as to liability, however, would not be affected by the unanswered interrogatories, the information which was sought being largely stipulated or irrelevant to our decision. On remand for a determination of individual damages, however, the trial court may exercise its discretion to cure any prejudice to defendants. For example, it may take as admitted in accordance with defendants' claims those questions which remain unanswered, Fed.R.Civ.P. 37(b) (2) (A), or, after a reasonable time for compliance has passed, ultimately dismiss the action as to those who are then in will-

ful noncompliance. *See* R. De Bouard & Cie v. S. S. Ionic Coast, S.D.Tex.1969, 46 F.R.D. 1.

Reversed and remanded in part.

BELL, Circuit Judge (concurring specially):

I concur specially to indicate my agreement with the result reached by the majority, and also to record a continuing belief that all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct. In a sense, this is a resurrection of the dissenting opinion of Judge Gewin in Norton v. McShane, 5 Cir., 1964, 332 F.2d 855, 863.

Here we properly hold defendants responsible for cruel and unusual punishment in violation of the Civil Rights Statute, 42 U.S.C.A. § 1983. They were acting under color of state law but in Norton v. McShane, we held the same law inapplicable to federal officers charged with conduct equally reprehensible. We went further and found the federal officers immune from accountability under the common law cause of action. I agreed then with Judge Gewin's strong dissent to the effect that the federal officers should not have been treated with impunity. It is regrettable that we have one law for Athens and another for Rome.

Such a condition is difficult for the average citizen to understand and makes an already complex system of federalism needlessly more complex. In a case involving federal officers, I would terminate this anomaly by seeking to overrule Norton v. McShane to the end of making all police and jailers subject to the same standard of accountability in their treatment of the citizen.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before JOHN R. BROWN, Chief Judge, and TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

It is ordered that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28971

KATIE RUTH ANDERSON, ET AL,
Plaintiffs-Appellants,
versus
J. J. NOSSER, ET AL,
Defendants-Appellees,
JAMES BRADLEY, ET AL,
Plaintiffs-Appellants,
versus
J. J. NOSSER, ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Mississippi

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(March 3, 1972)

Before BROWN, Chief Judge, and TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM, and RONEY, Circuit Judges.

BELL, Circuit Judge: The court, having been convened en banc, having considered additional briefs and having heard oral argument, modifies the panel decision in this matter, *Anderson v. Nosser,* 5 Cir., 1971, 438 F.2d 183, as follows.

I.

The federal cause of action is premised on 42 USCA, § 1983. The panel decision was that the uncontradicted evidence made out a case as a matter of law that cruel and unusual punishment was inflicted upon plaintiffs, or some of them, at the Parchman State Penitentiary. Section 1983 vouchsafes "all rights, privileges or immunities secured by the Constitution". The complaints alleged the deprivation of several such rights including the right not to have cruel and unusual punishment inflicted upon plaintiffs as well as the right not to have summary punishment imposed upon them without due process of law. We have carefully considered the evidence adduced on the trial and have concluded that the cause of action under § 1983 sounds more in the nature of a deprivation of due process through the infliction of summary punishment than the imposition of cruel and unusual punishment within the meaning of the Eighth Amendment. We therefore pretermit* decision on a § 1983 violation based on cruel and unusual punishment and place our decision on the due process clause of the Fourteenth Amendment. The result from the standpoint of a cause of action is the same: the establishment of a claim under § 1983 of such dimension as to warrant a directed verdict.

The panel concluded that a verdict should have been directed on the cause of action based on pendant jurisdiction that plaintiffs were not taken before a magistrate within a reasonable time as required by the Mississippi statute. Miss. Code Ann. § 2473. We affirm this holding.

The panel also held that a verdict should have been directed on the pendant jurisdiction claim based on mis-

*See the special concurring opinion of Judge Simpson herein in which JJ. Gewin, Coleman, Dyer, Morgan, Clark, Ingraham, and Roney join.

treatment of prisoners at the state penitentiary as proscribed by Mississippi law. Miss.Code Ann. § 7930 (1964 Ann. Supp.). This portion of the panel decision will be deleted. This is for the reason that this issue was not submitted to the jury and there was no objection on the part of plaintiffs as to the failure to submit it. We have given careful consideration to the entire record and have concluded that this was not an ultimate issue in the case although such a cause of action was alleged in the amended complaints.

As to the causes of action based on § 1983 and on failure to take plaintiffs before a magistrate, and the directed verdict on each cause as to liability, we next consider which defendants were due to be cast under the directed verdict. The panel imposed joint and several liability on defendants Brazeale, Robinson, Cameron, Cowart, Beach, Rickard and Flowers. We modify this holding.

II.

The facts center on two principal events. The first occurred in Natchez, Mississippi. The other was at the Parchman State Penitentiary, 215 miles away.

The Natchez occurrence included the arrest of plaintiffs while engaged in a civil rights march without a parade permit on one of the principal streets of Natchez, and their subsequent detention at the city auditorium for several hours. The arrests took place on Saturday, Sunday, and Monday, October 2, 3, and 4, 1964 under the same circumstances. The children who were arrested were released to their parents and some of the arrestees were released on bonds of $200 or on their own recognizance. The remaining arrestees were removed to the Parchman State Penitentiary on commercial buses, three busloads on Saturday, two on Sunday and one on Monday.

The jails of Natchez were insufficient to accommodate the number who did not make bond, and no arrangements were made to take them before a magistrate so that the magistrate might determine whether they should be held. Chief of Police Robinson checked with several counties and municipalities in an effort to find space for the arrestees but had no success. He then arranged to have them sent to Parchman.

The Natchez defendants are Chief Robinson, four city policemen, Cowart, Beach, Rickard, and Flowers, and Fire Chief Cameron who was pressed into service by the city council as an ex officio policeman. All assisted Chief Robinson but he testified, and this testimony was uncontradicted, that he made every arrest. It also appears that he was in complete charge at the auditorium. He did not go to Parchman but arranged over the telephone to have defendant Brazeale, the superintendent of the Parchman Penitentiary, receive and detain the arrestees pending their making bond. They made bond over the next several days, with the last arrestee leaving Parchman on Wednesday, October 6.

The Mississippi statute requires in specific terms that "Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case." Section 2473, supra. Chief Robinson testified that he was familiar with this statute and with his duty under it. He also testified that he contrived the rule that no one would be taken before a magistrate who had not posted bond, and that he knew that posting of bond had nothing to do with the requirement that the arrestees be taken before a magistrate. This makes it clear, as the panel held, that Chief Robinson failed to comply with this statute. However, the panel went further to hold the fire chief and the four police officers for this same dereliction.

It must be remembered that this holding is on the contention that a verdict should have been directed against them, the jury having found no liability. Unlike the absence of conflicting facts on the question in the case of Chief Robinson, there is a considerable conflict as to these five defendants. There is no testimony that the fire chief or the four police officers ever arrested anyone or that they were in position to take plaintiffs before a magistrate. As stated, the Chief of Police made every arrest and was in complete charge at the auditorium. In our view, whether they violated this statute as arresting officers was a jury question, and it follows that there is no basis for directing a verdict against them on this claim. The panel properly held that a verdict should have been directed against Chief Robinson on this claim.

The panel also held that Brazeale, the Parchman superintendent, who had nothing whatever to do with the Natchez events, was jointly and severally liable under this state claim. The question then is whether a verdict should have been directed against Brazeale for having failed to take the arrestees before a magistrate. He had nothing to do with the arrests or the detention in Natchez. It appears without contradiction that he had no part in the bonding procedures established by Chief Robinson for the arrestees in Natchez and Parchman. His sole role was that of jailer at Parchman. The statute places the responsibility on the arresting officer. Thus we conclude that a directed verdict was not due on this claim as to Brazeale.[1]

This leaves the claim based on the punishment inflicted upon plaintiff-arrestees at Parchman. This punishment was solely the work of Brazeale. He agreed to

1. There is some confusion in the record as to whether Brazeale was tried on this issue. It appears that a summary judgment had theretofore been granted in his favor on this claim. At any rate, our holding moots the question.

detain the arrestees for the City of Natchez. No arrangements were made as to the type of custody. He alone, insofar as the record shows, determined that he would place them in a section of the prison reserved for felons who for one reason or another were required to be in maximum security. He removed these felons from this section of the prison and placed them elsewhere. He had a set procedure which applied to felons in this section of the prison and which was different from the treatment accorded the other 1800 or so felons at Parchman who were not maintained in maximum security. Brazeale made the decision to apply this procedure to the arrestees from Natchez rather than giving them the milder treatment accorded felons generally.

One facet of this special treatment was that each person was compelled to take a laxative upon admission to maximum security. He applied this procedure to the arrestees who testified. Another tactic then employed in this section of the prison was that male prisoners were deprived of their clothing and issued underwear as their sole wearing apparel while confined.[2] This tactic was doubly imposed on the male arrestees. They were stripped of their clothing and left naked for varying periods of time, some for as long as 36 hours. None were issued underwear. Some were allowed to claim and wear their own underwear, one was allowed to wear the top to his underwear but not his shorts.

As to the female arrestees who testified, they were compelled to take the laxative. They were deprived of their coats and other outer garments, stockings and shoes, but were allowed to wear their dresses and undergarments.

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2. The present superintendent of Parchman testified that the practices of forcing the consumption of laxatives on prisoners in maximum security and giving them only underwear for clothing has been discontinued.

All arrestees were confined in cells designed to accommodate two persons, having two bunk beds, one lavatory, and one commode. They were not given mattresses, pillows or cover. The temperature ranged from 60° to 70°. From four to eight persons were placed in each of the cells. They slept on the bare steel beds or on the floor. They huddled together for warmth.

Despite the forced consumption of the laxative, toilet paper was in short supply. The penitentiary authorities blamed this on the fact that plaintiffs wasted the paper by covering the bunks with it. This may have been true, but it appears without dispute that toilet paper was in short supply. The penitentiary was also niggardly in supplying sanitary napkins to some of the female plaintiffs, it becoming necessary for one plaintiff to use her slip instead and for another to tear her slip into pieces for this purpose.

Two prisoners suffered so-called "breakdowns" during the confinement and were sent back to Natchez.

These facts appear without dispute,[3] and we think that they make out a case as a matter of law against Brazeale of summary punishment without any semblance of due process within the teachings of *Screws v. United States*, 1945, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495. See also *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (violation of Fourth Amendment through illegal search and mistreatment during the search by police officers stated a cause of action under § 1983). In *Screws*, a prisoner was beaten to death by the arresting officers, one of whom was the sheriff. He was prosecuted under 18 USCA, § 242 for

3. Plaintiffs also complain of having been given blood tests. The purpose of and the need for these tests was at least substantially disputed. One arrestee was found to have an infectious disease. The tests were given in the interest of preventing the spread of the disease. The tests disclosed that several others had infectious diseases. Whether this was an appropriate procedure and justified in an institution such as a prison under the circumstances was a jury question.

violating the civil rights of the prisoner. This statute is similar to § 1983[4] in all respects except for the use of the word "willfully' in the criminal statute. See *Monroe v. Pape*, supra, 365 U.S. at 187.

Here plaintiff arrestees were not beaten. However, they were charged with the minor offense of parading without a license in violation of a municipal ordinance for which the maximum sentence was a fine of $300 or 90 days. They had not been convicted and were in Parchman for detention pending the making of bond. The punishment they suffered has been described; it was designed for incorrigible felons but exceeded even the design It was inflicted arbitrarily and in the unfettered discretion of Superintendent Brazeale. He was the prosecutor, judge and jury in inflicting what we determine to be summary punishment. The imposition constituted a violation of a principle basic to the concept of due process of law—no punishment of mere arrestees without a trial. *Screws*, supra, 325 U.S. at 106.

We have previously held that a verdict should have been directed against Chief Robinson, the arresting officer,

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4. 42 USCA, § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

18 USCA, § 242:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

for failing to take plaintiffs before a magistrate. We now hold that a verdict should have been directed as requested against Superintendent Brazeale for violating plaintiffs' constitutional rights secured to them by § 1983, to-wit: denial of due process of law through summary punishment.

This leaves for decision whether Chief Robinson and the other Natchez defendants should have been included, along with Superintendent Brazeale, in the directed verdict for the punishment at Parchman. In *Nesmith v. Alford*, 5 Cir., 1963, 318 F.2d 110, we applied principles of tort law and charged all who had a substantial role in an arrest with a § 1983 violation. We found that their actions throughout were interlocked and intertwined. 318 F.2d at 119. The chain of causation which started in Natchez, for purposes of a directed verdict, may well have been broken or at least a jury might find that it was broken, as the jury here may have found, when plaintiffs were dispatched from Natchez to Parchman. On the other hand, it may be argued that as to Robinson, plaintiffs were at Parchman without having been taken before a magistrate, and that an appearance before a magistrate might have resulted in their not having been taken to Parchman. They would thus have avoided the punishment in question. It is true that Chief Robinson put them beyond the reach of a magistrate by sending them to Parchman. Nevertheless, questions of causation are usually for a jury under the Seventh Amendment. See *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374,[5] on when a verdict should be directed. Here the jury

5. ". . . If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. . . ."

might have drawn the inference that the conduct of Brazeale in inflicting the punishment described above was not foreseeable to Robinson. See Prosser, Law of Torts (4 Ed., 1971), p. 290, on questions of foreseeability being for the jury. Indeed, there is nothing in the record from which one might draw an inference that such unusual punishment was foreseeable.

There was no showing whatever that the other Natchez defendants, Robinson's subordinates, played any part in the decision to send the arrestees to Parchman. This circumstance supports the position that a directed verdict was not due against them on the § 1983 claim. We thus conclude that plaintiffs were not entitled to a directed verdict on the § 1983 claim as to liability against Robinson, Cameron, Cowart, Beech, Rickard and Flowers.

In sum, we hold that a directed verdict was due against Brazeale as to liability on the § 1983 claim based on the improper treatment at Parchman. A directed verdict was due against Chief Robinson as to liability for his violation of the Mississippi statute in failing to take plaintiffs before a magistrate.

On remand, all plaintiffs who can show themselves as having suffered the punishment as described herein under the § 1983 claim may assert their claim for damages. The same is true as to the plaintiffs who fall into the category of those who were not taken before a magistrate. The § 1983 damages will be asserted against Brazeale alone. The damages for failing to take plaintiffs before a magistrate will be asserted against Robinson alone.

Except as modified, the results reached in the panel decision are adopted.

AFFIRMED in part; REVERSED in part; REMANDED for further proceedings not inconsistent herewith.

SIMPSON, Circuit Judge, with whom GEWIN, COLEMAN, DYER, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges, join, CONCURRING SPECIALLY:

I voice no objection to the opinion prepared for the en banc Court by Judge Bell with one slight but nevertheless significant exception.

Rather than hold that we "pretermit decision on a § 1983 violation based on cruel and unusual punishment" I would decide forthrightly that no violation of Eighth Amendment rights warranting the direction of a verdict as to liability was made out below, and definitely disapprove the panel decision to this effect.[1]

TUTTLE, Circuit Judge, with whom BROWN, Chief Judge, and WISDOM, Circuit Judge, join, CONCURRING IN PART AND DISSENTING IN PART:

Having concurred in the original opinion for the court, see *Anderson v. Mosser*, 5 Cir. 1971, 438 F. 2d 183, I now adhere to all that is said in that opinion. I agree that the relief now granted by the court under the provisions of the Fourteenth Amendment are appropriate, but, like my colleague, Judge Goldberg, I also believe that the relief afforded against the other defendants was appropriate. The breaches of the plaintiff's rights by all of these defendants was, in light of the fact that they had been convicted of no crime, not only a violation of their Fourteenth Amendment rights, but their rights not to be subject to cruel and unusual punishment under the Eighth Amendment. For myself, I would hold that the actions described in the opinion of the court that occurred at Parchman were cruel and unusual punishment, no matter what the status of the person in custody. However, the circumstance of

1. My views as to civil liability under the cruel and unusual punishment clause under the Eighth Amendment are as explicated in my special concurrence in *Arthur Roberts, by his father and guardian, etc. v. Columbus Williams, et al.*, [No. 28,829, decided April 1, 1971, 5 Cir. 1971, ... F.2d .....]

the confinement of these plaintiffs, none of whom had been convicted of any offense, makes it even more apparent that the Eighth Amendment prohibits what was done to them. Ever since the Supreme Courts decided *Weems v. United States* in 1909, 217 U.S. 349, it has been held, as stated in the syllabus of the Weems opinion, that "in interpreting the Eighth Amendment it will be regarded as a precept of justice that punishment for crime should be graduated in proportion to the offense."

I, therefore, concur in the opinion and judgment of the court as far as it goes to afford relief. I dissent from that part of the opinion and judgment which denies relief as against the defendants covered by the original opinion and which holds that relief afforded is mandated only by the prohibitions contained in the Fourteenth Amendment.

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge, WISDOM and THORNBERRY, Circuit Judges, join, CONCURRING IN PART AND DISSENTING IN PART:

I neither retreat nor recede one whit from my analysis of the facts and law in writing for the original panel in this case. *See Anderson v. Nosser,* 5 Cir. 1971, 438 F.2d 183. Specifically, I retract not one jot or tittle from the decision that the perpetrated deeds which occurred at Parchman constitute cruel and unusual punishment interdicted by the Eighth Amendment. While believing that the heinousness of the Parchman events does not tolerate judicial pretermission, I nevertheless do not dissent from the holding that such perpetrations also violate the Due Process protections afforded by the Fourteenth Amendment. There are many roads to Rome, and while one is clearly marked "Eighth Amendment," I agree that passage can be had along that wide, familiar boulevard known as "Due Process."

While I accede to the applicability of the Due Process avenue, I am unable to assent to the wholesale absolution of various Natchez defendants. My Brother Bell's opinion limits liability for the Natchez derelictions to Chief of Police Robinson, exculpating his subordinates and associates. It is clear that the Fire Chief and the four police officers, acting pursuant to Robinson's commands, assisted in arresting the demonstrators, in detaining them in the auditorium, and in herding them off to Parchman. Since these Natchez defendants participated directly in the denial of magistratical confrontation which resulted in the invasion of the plaintiffs' rights, I perceive no reason to splice the rope that noosed the plaintiffs. Indeed, any other result runs counter to this court's decision in *Nesmith* v. *Alford*, 5 Cir. 1963, 318 F.2d 110, *cert. denied*, 1964, 375 U.S. 829. In addition, I am unable to concur in the exoneration of Superintendent Breazeale for his participation in the failure to take the plaintiffs before a magistrate. The noose that began in Natchez finds its final strands in the hands of the Superintendent, and *Nesmith* dictates that the very minimum of liability for Natchez's activities must be visited against the jailer.[1] *See Whirl* v. *Kern*, 5 Cir., 1969,

1. The court below entered summary judgment for the defendant Breazeale concerning the plaintiffs' claim for false imprisonment. Defendants assert that this court cannot now reverse that decision since no appeal was taken therefrom. The simple answer to this contention can be found in F.R.C.P. 54. Rule 54(b) provides that unless otherwise appealable by statute a district court order adjudicating less than all of the claims in a single action is not a final judgment and thereby appealable unless the district judge makes an express determination that there is no just reason for delay and an express direction for the entry of judgment. Thus, if a district judge does not "certify" a partial adjudication, it remains interlocutory in nature and cannot be appealed until properly certified or until the district court enters judgment disposing of all of the claims and all of the parties. The court below made no such certification, and hence the court carried Breazeale's summary judgment order with the case. That order did not become final until after the jury returned its verdict and the district court entered judgment which disposed of the entire case. *See generally*, 6 J. Moore, Federal Practice ¶ 54.28 and cases cited therein.

407 F.2d 781, *cert. denied*, 396 U.S. 901. Repressing any penchant for verbiage, I simply iterate the convictions expressed in my original opinion regarding the scope and nature of the defendants' liability.

APPENDIX "C"

8. The contested issues of fact are as follows:

a. Were the demonstrations of October 2, 3 and 4, 1965, peaceful and orderly?

b. Were the arrests of October 2, 3 and 4 made in good faith and with probable cause?

c. Were the plaintiffs or any of them pushed, cursed, hit, kicked or pushed prior to and while being loaded on the buses to the City Auditorium?

d. While aboard the paddy wagon and enroute to the City Auditorium were the plaintiffs harassed by being cursed, threatened and made to lose their balance by sudden unnecessary stops?

e. Were plaintiffs informed by the defendants of their right to counsel, their right to make a telephone call or their right to be released on bail?

f. Did defendants ignore or impede the release of plaintiffs by refusing bail bonds to be posted by, or on behalf of, certain plaintiffs?

g. Upon plaintiffs' arrival at Parchman, were they made to stand in the cold for about one hour, cursed and insulted by Natchez policemen and firemen?

h. Upon plaintiffs' arrival at Parchman, were they, or any of them, kicked or beaten by Natchez police officers and firemen or by patrolmen of the Mississippi Highway Safety Patrol?

i. Were male plaintiffs made to strip naked and remain so for a day or more and thereafter only allowed to wear undergarments?

j. Were female plaintiffs required to expose themselves to the view and obscene remarks of male prison employees and others?

k. Were the majority of plaintiffs compelled by trick, threat of force and violence to consume a cupful of harsh laxative?

l. Did said laxative render plaintiffs sick, disrupt their normal bowel control and cause frequent defecation?

m. While incarcerated in Parchman did the plaintiffs have mattresses, blankets and pillows?

n. Were the cells crowded beyond capacity with plaintiffs?

o. By reason of cell overcrowding and the laxative given to the plaintiffs were the cells rendered unsanitary and unhealthy?

p. Were the plaintiffs ever allowed a shower?

q. Were the cells unheated?

r. Did prison employees open windows or turn on fans for the purpose of creating cold and unhealthy conditions for the plaintiffs?

s. What was the temperature in the cells?

t. Were plaintiffs given adequate toilet paper under the circumstances?

u. Were plaintiffs denied drinking cups and soap?

v. Was running water available in the cells?

w. Was the food at Parchman fit for human consumption?

x. Were plaintiffs made to submit to blood tests against their will?

y. Was medical attention at Parchman refused or withheld?

z. Were plaintiffs or any of them cursed, threatened with bodily harm and being doused with cold water when they asked for medical attention?

aa. Did plaintiffs have to make their own arrangements for transportation back to Natchez and pay any expenses they incurred themselves?

bb. Did plaintiffs undergo pain and suffering, serious mental and physical injuries and rendered sick and ill for varying periods with abnormal bowel functions, colds and other respiratory infections?

cc. Were plaintiffs deprived of human dignity?

dd. Were the conditions and treatment plaintiffs received at Parchman intended to make them as miserable as possible?

ee. Was the purpose of this incarceration to punish plaintiffs for and to deter them from advocating equal rights for Negroes?

ff. Were the plaintiffs given an opportunity to make bond and were the plaintiffs given the opportunity to make a telephone call?

gg. Were any of the plaintiffs assaulted by any defendant?

hh. Did any conspiracy exist by and between the defendants or any of them?

ii. What was the identity of any defendant inflicting any assault or battery on any plaintiff and of any plaintiff who had inflicted on him or her any assault and battery?

jj. Did any plaintiff suffer any compensatory damages?

kk. Is any plaintiff entitled to any punitive damages and, if so, from whom?

ll. Were minor plaintiffs integrated with persons over the age of 18 years?

APPENDIX "D"

TESTIMONY OF THOMAS J. LICATA

"Q. And did you have an opportunity to observe the food these people were served while you were there?

A. I did.

Q. Would you tell the jury what it was?

A. Well, to me it was good wholesome food . . .

By the Court:

Just answer the question. "Good wholesome food?

A. Yes, sir.

By Mr. Zuccaro:

Q. Did you eat it?

A. Well, I seen it cooked and it was cooked in a good wholesome way, and it was served in a good wholesome way. It was served on G.I. stainless steel trays, and they had a G.I. stainless steel cup to drink out of. They had ham, they had pork chops, they had potatoes, they had sweet potatoes, they had beans, they had greens, they had carrots, they had beets, and it was all good clean food." (R. 550)

APPENDIX "E"

"Q. Mr. Licata, did you have an occasion at any time to be asked about any—did you have any requests from the Natchez prisoners? Did any of them make any requests of you?

A. Oh, yes.

Q. What was that?

A. They asked for aspirin.

Q. What did you do?

A. I got them aspirin.

Q. Any other thing?

A. They asked for sanitary napkins, which they got, the sanitary napkins. They asked for toilet paper and they got that too.

Q. Were you generally available to all the Natchez prisoners up there?

A. I was.

Q. How many hours a day were you available.

A. From seven in the morning until about seven at night.

Q. Did you have occasion to see most of them during that period of time?

A. Oh, yes, I walked down through the cell block.

Q. Did you talk to any of them?

A. Oh, yes, I talked to them. I knew most of them.

Q. Did any of them have any complaints?

A. Well, if they had any complaints I tried to the best of my ability to satisfy them.

Q. Did anybody ask you anything about any medical assistance?

A. Oh, yes, whenever anyone was sick or needed to go to the doctor they would send for the doctor.

Q. Who arranged that?

A. I did, through the sergeant that was in charge of maximum security." (T. 550-554)

. . .

Q. Well, I didn't phrase that very well. What I meant was did the prisoners use up or run short of toilet paper?

A. Well, now, when we first got there to the best of my knowledge they were given plenty of toilet paper but they misused it.

. . .

A. They were issued toilet paper in a reasonable amount.

BY MR. JOLLES:

Q. I see. And when you say that they misused it what you mean is that they put it on their bunk used it for padding on the bunk?

A. And also stopping up the toilets and the basins.

Q. But it is true that is what they were doing, at least in part, putting it on their bunk, is that right?

A. They could have. I have seen it laying on the bunk." (T. 557-558)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1571

J. J. NOSSER, *et al.*,
Petitioners,

v.

JAMES BRADLEY, *et al.* and
KATIE RUTH ANDERSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners have requested this Court to review the en banc decision of the Court of Appeals for the Fifth Circuit which unanimously held that petitioner Breazeale was liable to respondents under 42 U.S.C. §1983 for summarily punishing them without due process of law, and that petitioner Robinson was liable to respondents under Mississippi law for failing to take them before a magistrate. This brief in opposition is submitted by respondents to set forth their views as to why the petition should be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly found that judgment notwithstanding the verdict was appropriate when the facts are undisputed.

2. Whether there is an issue of vicarious liability in this case since the court below did not find any petitioner liable under the doctrine of respondeat superior.

3. Whether the court below properly held petitioner Breazeale liable for summarily punishing respondents without due process of law.

4. Whether the court below properly held petitioner Robinson liable under state law because of his undisputed denial of respondents' right to be taken before a magistrate.

5. Whether petitioner Breazeale has any immunity from damages for violation of the constitutional rights of persons in his custody.

6. Whether any of the facts relied on by the Fifth Circuit in reaching its decision were controverted.

STATEMENT OF THE CASE

The facts as stated by petitioners are not entirely in accord with the record or with the facts as set forth by both the panel below and the en banc court. Accordingly, respondents will restate the facts as shown by the record.

It is important to note at the outset that the panel relied "solely on stipulations and undisputed testimony" in reaching its decision (App. 9), and the en banc court similarly relied only on facts which "appear without dispute" (App. 54). In large part, the undisputed facts upon which both courts imposed liability were established by the pleadings or by stipulation or admission of counsel, and were set forth in a pre-trial order approved by the district judge and all counsel for all parties.[1] The remaining facts were established by admissions of peti-

[1] For the convenience of the Court, the relevant portions of the pre-trial order are reprinted as an Addendum in this Response. The Addendum is hereafter referred to as "Add."

tioners or their witnesses. Relying solely on evidence which thus appears without dispute, we briefly review the facts.

On October 2, 3, and 4, 1965, respondents and many others paraded in Natchez, Mississippi to protest racial discrimination. R. 201; Add. 1. At the time, a Nachez ordinance prohibited parades without the written permission of the chief of police. R. 201-02, 969. The ordinance was unconstitutional, but at the time it had not been judically so declared. R. 202. The marchers were arrested by petitioner Robinson and other Natchez police officers for violating this ordinance, on October 2 after proceeding half a block, on October 3 "shortly" after the march commenced, and on October 4 after 60 yeards. R. 202, 206; Add. 1, 3.

After the arrests on Saturday morning, October 2, respondents were transported to the Natchez city auditorium where they were detained until late Saturday night. R. 203; Add. 1-2. During that time, and indeed during the entire time they were incarcerated, they were not brought to a judicial officer for examination of their cases, nor was any attempt even made to secure a magistrate. R. 203, 303; Add. 2.

Late that Saturday night those respondents arrested during the day were transported by bus to the Mississippi State Penitentiary at Parchman, more than 200 miles away. Arrangements for the transfer had been made late Friday evening, October 1, or early Saturday morning, October 2, prior to any arrests, when an unidentified Natchez official telephoned petitioner Breazeale, the penitentiary superintendent, to determine if space was available to house prisoners from Natchez. R. 569, 586. This was the only communication made to Breazeale regarding the transfer. R. 587. The initial group of prisoners arrived at the penitentiary early Sunday morn-

ing, October 3, and were taken to its maximum security unit on orders of respondent Breazeale. Thirty-nine cells had been vacated for the Natchez prisoners (R. 205, Add. 2), and more than 250 prisoners were ultimately housed there. R. 590; Pl. Ex. 2-A.

The State Penitentiary at Parchman is the authorized place of detention for convicted felons in Mississippi. Miss. Code 1942 Ann. §7922 (Supp. 1968). They are normally housed in open camps. R. 566-67. However, prisoners who violate prison rules or who are dangerous may be sent to the maximum security unit for punishment. R. 215, 567, 585. The punishment, in such cases includes stripping the prisoner, giving him a laxative, requiring him to sleep without bedding, depriving him of his possessions and not permitting him any exercise. See R. 211, 584, 592.

In cases, such as the present one, where local prisoners were sent to the State Penitentiary on the ground that local jail space was unavailable, Superintendent Breazeale confined them in the maximum security unit, and he saw no reason to vary the standard punishment imposed there on pentitentiary prisoners who committed acts requiring additional punishment. R. 568, 585-86. Accordingly, on their arrival at the maximum security unit, all of the male prisoners from Natchez were required to strip naked, and all women were ordered to remove their shoes, stockings, sweaters, coats, jewelry and wigs. The respondents were required to consume a quantity of laxative.[2] They were deprived of all personal belongings, including sanitary napkins and medicines. R. 205, Add. 3.

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[2] Petitioners state "all prisoners were offered and some took a laxative." The pre-trial order, which is controlling, states that all prisoners "were required to strip naked and consume a quantity of laxative." Add. 3. There was no element of voluntariness.

Respondents were inspected and searched, and then led to the cells. The cells contained two steel bunks without matresses or other bedding,[3] a toilet without seat, and a washbasin. R. 204-05, 556; Add. 2. See Pl. Ex. 1, a photograph of a representative cell. Up to eight persons were placed in each cell. R. 225, 358, 555. There were no towels, soap or the like. The temperature ranged from 60 degrees to perhaps 70 degrees. R. 551.

After being in their cells for varying periods of time, some of the respondents were permitted to get only their underwear. R. 274, 378-79, 424. Some were permitted to wear undersirts, but not underpants. R. 378. Some were nude for periods up to 36 hours. R. 274. Others were never given even underwear. See R. 447-48. Petitioners' own witness did not contradict this testimony. *Cf.* R. 556-57.

Other indignities were inflicted, as shown by uncontradicted testimony of respondents. In addition to lack of sanitary facilities such as towels, soap, toothbrushes, toothpaste, and drinking cups, there was inadequate toilet paper, exacerbated by the fact that each respondent had been forced to consume a laxative. The rule of thumb in issuing toilet paper seems to have been about one lap around a roll for each person in a cell. See R. 226, 266, 325, 376, 404, 460. Some respondents had to use their hands to clean themselves. See R. 268-69.[4]

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[3] Petitioners state that "mattresses, pillows and covers were not available in every room." Petition at 4. The fact is that there was no bedding in *any* cell. As petitioner's own witness, Licata, emphatically stated: "I never did see no mattresses up there no where and I went all over it." R. 556.

[4] Three reasons were given for the inadequate toilet paper. First, petitioners' witness testified that "they couldn't afford to give them a roll." R. 559. Second, apparently some respondents "misused" toilet paper given them by attempting to cover the bare steel bunks with it. R. 558-59. Third, petitioners' witness testified

Some women were not given sufficient sanitary napkins, with the result that at least one woman was forced to use her slip for that purpose. R. 226, 325.

There was inadequate heat. The temperature ranged between 60 and 70, R. 551, a pleasant fall day unless one was nude or wearing only underwear. Exhaust fans (to "change the air," R. 572) blew intermittently on appellants. R. 225, 267-68, 423, 447. They were freezing, and huddled together for warmth. See R. 225-26, 324, 376-77, 402, 460.

Following additional arrests on Sunday, October 3 at about 10:30 a.m. and Monday, October 4 at about 9:00 p.m., those respondents arrested were detailed in Natchez and then transported to the penitentiary. Their treatment there was similar to that given the initial group. R. 206; Add. 3. The prisoners were ultimately released by Wednesday, October 6. R. 207; Add. 4.

At least two respondents actually "cracked up" as a result of the treatment given them at the penitentiary. See R. 563.

THE DECISION BELOW

The Fifth Circuit, sitting en banc, held that on these undisputed facts, respondents were entitled to judgment under 42 U.S.C. §1983 against petitioner Breazeale for the summary punishment inflicted by him at the penitentiary without any semblance of due process of law, and against petitioner Robinson, who made the arrests, for failing to take respondents before a magistrate as required by Mississippi law.

We think it noteworthy that every one of the sixteen judges of the Fifth Circuit agreed with the result outlined

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that toiler paper was used to stop up toilets. R. 557. This was contradicted. R. 380. After this, toilet paper was issued only in "reasonable amounts," the quantity not specified. R. 557.

above. Eight judges would have disapproved the holding of the panel that the treatment imposed at the penitentiary by Breazeale constituted cruel and unusual punishment prohibited by the Eighth Amendment, while five judges would have gone further and imposed liability on all of the original defendants who participated in the arrests of and detention of respondents. However, all members of the Court concurred in Judge Bell's opinion for the Court. While this Court is certainly not bound by this unanimity in our view this 16-0 decision represents imposing authority for its correctness.

ARGUMENT

I.

THE COURT BELOW PROPERLY FOUND THAT JUDGMENT NOTWITHSTANDING THE VERDICT WAS APPROPRIATE ON UNDISPUTED FACTS.

As previously noted, both the panel and the en banc court relied solely on stipulations and undisputed evidence in determining that judgment notwithstanding the verdict was appropriate. App. 9, 54. There can be no doubt that evidence of such quality warrants withdrawing a case from jury consideration. See *e.g., Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209 (1931); 5A Moore, *Federal Practice* ¶ 50.02 at 2319 n.10 (2d ed. 1971).

Petitioners argue that they perceive a difference in the test for judgments enunciated by the Fifth Circuit in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) and this Court's language in *Brady v. Southern Ry.*, 320 U.S. 476 (1943). In *Boeing*, the court held that "if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions [for directed verdict or judgment notwithstanding the verdict] is proper." 411

F.2d at 374. In *Brady*, the Court stated that when "there can be but one reasonable conclusion as to the verdict," a motion for judgment is appropriate. 320 U.S. at 479. We are able to see no significant difference in these two formulations. Indeed, it would seem that the Fifth Circuit in *Boeing* was simply attempting to flesh out the *Brady* test in language that would be usable by a trial or appellate court considering such a motion.

This analysis is, however, irrelevant in the present case for the plain fact is that here judgment was granted on stipulations and undisputed facts, and the courts below thus did not need to choose between any arguably varying standards for weighing facts. Petitioners in essence seek to have this Court review the decision in *Boeing Co. v. Shipman, supra*, but the case before the Court is *Nosser v. Bradley*, and the rule there applied that judgment is appropriate on undisputed facts has, to our knowledge, never been questioned.

II.

THERE IS NO ISSUE OF VICARIOUS LIABILITY IN THIS CASE SINCE THE COURT BELOW DID NOT FIND ANY PETITIONER LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR.

Petitioners argue strenuously that vicarious liability cannot be imposed on petitioner Breazeale in a damage action under 42 U.S.C. §1983. See Petition at 15-19. The fact is that the court below did not impose liability vicariously; Breazeale was held liable for personally ordering and directing the punishment of respondents. As the court stated, "this punishment was solely the work of Breazeale." App. 52. The court further detailed the personal actions of Breazeale in punishing respondents, to which we refer this Court without additional discussion. See App. 52-54.

The decision of the panel makes it crystal clear that no person was held liable vicariously. The panel exonerated one of the original defendants, Commissioner of Public Safety Birdsong, because it found no evidence that he participated in, had knowledge of, or was negligent in supervising highway patrolmen who were alleged to have beaten many of the respondents during the period they were in custody. App. 35-36. The panel specifically noted that, as to the warden, "we do not decide whether the doctrine of *respondeat superior* has vitality in a suit under section 1983." App. 36 n.13. These rulings of the panel were not disturbed by the en banc court.

The doctrine of *respondeat superior* is thus not in any way involved in this case. Petitioners seek no more than an advisory opinion from this Court on this issue.

III.

THE COURT BELOW PROPERLY HELD PETITIONER BREAZEALE LIABLE FOR SUMMARILY PUNISHING RESPONDENTS WITHOUT DUE PROCESS OF LAW.

The undisputed facts make it clear that Breazeale ordered respondents subjected to the same punitive regimen applied to penitentiary prisoners who had violated prison rules and were sent to the maximum security unit for punishment. As we have noted, this treatment included stripping the prisoner, requiring him to consume a laxative, depriving him of bedding, etc. The panel termed this "subhuman treatment which beggars justification and taxes credulity," App. 8-9, and held that it constituted cruel and unusual punishment. The en banc court stated that the punishment "was designed for incorrigible felons but exceeded even the design. It was inflicted arbitrarily and in the unfettered discretion of Superintendent Breazeale." App. 55. The en banc court found this constituted a violation of "a principle basic to

the concept of due process of law—no punishment of mere arrestees without a trial." App. 55.

The notion that persons detained prior to trial are detained solely to insure their appearance at trial and may not be subjected to punishment over and above this simple detention is not novel or startling. Blackstone states:

> "Upon the whole, if the offense be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand . . . ; there to abide till delivered by due course of law. But this imprisonment . . . is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . . "

4 Blackstone, Commentaries on the Laws of England 300 (7th ed. 1775). There is no dearth of modern cases taking the same view. See *Hamilton v. Love*, 328 F. Supp. 1182, 1191 (E.D. Ark. 1971); *Seale v. Manson*, 326 F. Supp. 1375, 1379 (D. Conn. 1971); *Jones v. Wittenberg*, 323 F. Supp. 93, 100 (N.D. Ohio 1971); *Davis v. Lindsay*, 321 F. Supp. 1134, 1139 (S.D. N.Y. 1970); *Palmigiano v. Travisano*, 317 F. Supp. 776, 785 (D.R.I. 1970); *Tyler v. Ciccone*, 299 F. Supp. 684 (W.D. Mo. 1969); *Butler v. Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964). See generally Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970).

The due process clause is an appropriate vehicle through which to protect the dignity and security of arrested, but still presumptively innocent, persons. The basic premise relied on by the court below is that "those who decide to take the law into their own hands and act

as a prosecutor, jury, judge and executioner plainly act to deprive a prisoner of the due process of law guaranteed him." *Screws v. United States*, 325 U.S. 91, 106 (1945). Other cases have found mistreatment of the kind practiced in this case to be due process violations. Thus, in *Monroe v. Pape*, 365 U.S. 167 (1961), part of the police mistreatment complained of was the forced nudity of plaintiffs in the presence of police officers. Justice Frankfurter, even in dissent, agreed that the "calculated degradation of insult and forced nudity" was a violation of due process. *Id.* at 210-11 (dissenting opinion). Forced consumption of a laxative is also unlawful. For example, in *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943), a criminal prosecution, it was held that persons who were forced to drink castor oil, denied food and toilet facilities, and marched out of town on a rope, had been deprived of constitutional rights.

The forced nudity of appellants also invaded one of the basic "zones of privacy," *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), protected by the Constitution. In *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 959 (1964), where the plaintiff was photographed in the nude by police officers, the court stated:

> "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."

Closer factual parallels to the present case may be found in cases testing treatment in prison against the Eighth Amendment, and those cases have universally condemned the kind of treatment respondents here were subjected to.

Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), involved a "strip cell," where the prisoner was kept naked and was denied the use of basic necessities such as toilet paper, soap, towels, and the like. The court held that these "subhuman conditions . . . could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency." *Id.* at 526. In *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969), the question was the legality of a "dry cell," similar to the strip cell considered in *Wright v. McMann*. The court held that it was "evident that fundamental concepts of decency did not prevail." *Id.* at 791-92. The court added, in words equally applicable to this case (*id.* at 792):

> "Particularly barbaric are the facts that plaintiff is forced to sleep in the nude on a bare concrete floor without even the comfort of a blanket . . . . Equally offensive is the fact that he is provided with no means by which he can maintain his personal cleanliness, with the result that he is forced to live and eat under animal-like conditions."

See also *Kelly v. Butler County Board of Commissioners*, 399 F.2d 133 (3d Cir. 1968), 399 F.2d 132 (3d Cir. 1967); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Knuckles v. Prasse*, 302 F. Supp. 1036, 1061-62 (E.D. Pa. 1969); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

Although the en banc court did not choose to rest its decision on the Eighth Amendment, these cases constitute important support for its due process decision, for if treatment of the kind administered here cannot be imposed on convicts because of the Eighth Amendment, it certainly could not be imposed on non-convicts

without any due process safeguards whatsoever. Even convicts are entitled to minimum due process safeguards before any substantial deprivations may be imposed on them for prison misconduct. *E.g., Sostre v. McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971) (en banc).

Finally, we would note that respondents were also denied equal protection by the treatment here imposed. As pre-trial detainees, they were entitled, at worst, to be treated the same as ordinary convicts incarcerated at the state penitentiary. See *Hamilton v. Love, supra*, 328 F. Supp. at 1191 (conditions for pre-trial detainees must be *superior* to those of convicted prisoners). Yet respondents were not treated as ordinary convicts; they were treated as convicts who had violated prison regulations and were accordingly punished. This arbitrary classification denied respondents equal protection of the laws.

In summary, there was utterly no justification for the inhuman and degrading treatment of respondents. The primary defense that this treatment was necessary because respondents were housed in the maximum security unit and that was the standard procedure in maximum security is one that no court could accept, and indeed all sixteen judges of the en banc court rejected it. It is akin to saying that if, perchance, respondents had been housed on death row, then execution would be the necessary concomitant. In our view, the en banc court properly held this a violation of due process, the panel properly held it to constitute cruel and unusual punishment, and the equal protection clause would also be a sound basis for decision.

IV.

THE COURT BELOW PROPERLY HELD PETITIONER ROBINSON LIABLE UNDER STATE LAW BECAUSE OF HIS UNDISPUTED DENIAL OF RESPONDENTS' RIGHT TO BE TAKEN BEFORE A MAGISTRATE.

It is admitted that none of the respondents was taken before any judicial officer at any time. (R. 203; Add. 2, 3.) Further, no attempt was even made to do so. The arresting officer, petitioner Robinson, testified:

> "Q. Well, to your knowledge, Chief Robinson, did you or anyone else to your knowledge who was an official of the city of Natchez make any attempt to bring any of these people before a magistrate, justice of the peace, or any judicial officer before they were sent to Parchman?
>
> "A. No, sir." (R. 303)

Robinson's justification for failure to take appellants before a judicial officer was that they had not posted bond:

> "Q. What happened relative to that, Chief Robinson, relative to them being taken before Judge Keyer? Were they taken before Judge Keyer?
>
> "A. The bonds were set, the ones that got out on bonds, were set returnable before Judge Keyer." (R. 500)

Robinson admitted that in requiring a bond as a condition to presentation to a magistrate, he was not acting in accordance with law:

> "Q. Chief Robinson, do I understand your testimony to be then that before anybody could have been taken before a magistrate they had to put up a $200.00 bond, is that true?
>
> "A. Yes, sir, a $200.00 property bond."

* * *

"Q. . . . I assume then that you are aware that any officer making an arrest in the state of Mississippi is required to bring his prisoner before a magistrate without unnecessary delay. Are you aware of that statute?

"A. Yes, sir."

* * *

"Q. And did that statute ever provide in there that they had–anybody had to put up any amount of bail before he could be taken before a magistrate?

"A. Not to my knowledge.

"Q. So the fact that anybody didn't put up bail has nothing to do with going before a magistrate, isn't that right?

"A. That's right.

"Q. And you know that?

"A. That's right.

"Q. But you didn't do that?

"A. That's exactly right." (R. 503-04)

These undisputed facts clearly entitle respondents to judgment for false imprisonment under Mississippi law. Since as early as *Anderson v. Beck*, 64 Miss. 113, 8 So. 167 (Miss. 1886), Mississippi has recognized that delay in bringing a prisoner before a magistrate gives rise to an action for false imprisonment:

> "A warrant is process for the arrest of a person who, when arrested, should be taken before an officer authorized to inquire into the cause of arrest, and the unexplained detention of the party by virtue of process for his arrest without any *mittimus*, was a cause of action."

By statute, "every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case." Miss. Code 1942 Ann. § 2473.

Under the statute, where there is no arraignment on the date of arrest, the burden of proof shifts to the arresting officer "to show that a reasonable effort was made to induce a magistrate or justice to issue a warrant and fix bail on the date of arrest." *Sheffield v. Reece,* 20 Miss. 133, 28 So.2d 745, 749 (1947). See also *Anderson v. Beck, supra,* making actionable an "unexplained" detention. Presentation to a magistrate is required to grant the accused "an opportunity to have a hearing on the merits of the accusation against him." *Sheffield v. Reece, supra,* 28 So.2d at 746. Where the accused can promptly post bond and secure his liberty, compelling reason for immediate presentation for inquiry into the merits disappears. But where those arrested cannot make bond immediately, as in the present case, presentation before a magistrate becomes imperative. As the court stated in the *Sheffield* case, "one thus arrested may, in some instances, be unable to execute a bail bond, but he is nevertheless entitled, in such event, to have his case examined into without unnecessary delay." *Id.* at 746-47. Here, of course, none of the respondents could execute a bond, and it was therefore Robinson's duty to bring them promptly before a magistrate.[5] He made no attempt whatsoever to do so.

Petitioners apparently seek to explain Robinson's failure to make any attempt whatever to secure a magistrate on the ground that the first arrests were made Saturday afternoon and Robinson was "well aware" that

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[5]A defense that delay was necessary or reasonable was not attempted, but in any event delay of up to five days seems unreasonable as a matter of law. *Cf. Sheffield v. Reece, supra,* where the delay was from Saturday to the following Monday, and *Dunning v. State*, 251 Miss. 766, 171 So. 2d 315 (Miss. 1965), where the Court assumed that an unexplained three and one-half day delay was undue delay.

the municipal judge was not in his office Saturday afternoons or Sunday. Petition at 24.

First, the initial arrests were made on Saturday *morning* when, according to petitioners, the judge was holding court. (R. 202, Add. 1) Second, there is nothing in the record to indicate that the local judge would not have remained in his office Saturday afternoon,[6] particularly since Miss. Code 1942 Ann. §3374-103 requires a municipal judge to hold office on Saturdays "if the business of the municipality requires," and it might be assumed that hundreds of arrests in the municipality would constitute such business. Third, there is no explanation why no attempt was made to bring respondents before a judge on Monday, Tuesday or Wednesday, while they were still incarcerated.

But these are merely suppositions, and we are left to supposition because of the simple fact that petitioner Robinson, who made the arrests, gave no reasons whatever for failing to bring respondents before a magistrate. Thus, we do not know that the magistrate was unavailable, even though petitioners' counsel now say he was, because no attempt was made to see if he was available. The burden of explaining a failure to present an arrestee to a magistrate rests, in Mississippi law, quite clearly with the arresting officer, and Robinson did not meet this burden. He cannot evade liability by now hypothesizing all the things that might have occurred had he attempted to secure a magistrate.

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[6] Indeed, there is nothing in the record to indicate the local judge was in fact not in his office. This is simply the assertion of petitioners in their Petition.

V.

PETITIONER BREAZEALE HAS NO IMMUNITY FROM DAMAGES FOR VIOLATION OF THE CONSTITUTIONAL RIGHTS OF PERSONS IN HIS CUSTODY.

Petitioner Breazeale argues that this Court should grant to state prison officials an absolute immunity for actions, such as those in the present case, which deny their prisoners fundamental constitutional rights. Such an immunity would essentially nullify the basic purposes of 42 U.S.C. §1983, for that statute is only applicable to persons acting under color of state law, and can thus rarely be satisfied except in the case of a state official. See, *e.g., Jobson v. Henne,* 355 F.2d 129, 133-34 (2d Cir. 1966); *Birnbaum v. Trussell,* 347 F.2d 86, 88-89 (2d Cir. 1965). Nevertheless, petitioners cite cases dealing with immunity of legislative or judicial officers, or of administrative officers, such as parole officers, who act in a judicial or quasi-judicial capacity, and argue from this that all state officials are immune from damages in suits under section 1983.

It is clear that this is not the law. 42 U.S.C. §1983 authorizes actions against state officials for deprivation of constitutional rights, and monetary damages are an appropriate remedy under the statute. *E.g., Monroe v. Pape,* 365 U.S. 167 (1961); *Hague v. CIO,* 101 F.2d 774 (3d Cir. 1939), modified on other grounds, 307 U.S. 496. Only recently, this Court held that state prison officials may be required to stand trial for monetary damages in 1983 actions, *Haines v. Kerner,* 404 U.S. 519 (1972), and the Court has repeatedly held that section 1983 is an appropriate vehicle through which state prisoners may assert basic constitutional rights. *Wilwording v. Swenson,* 404 U.S. 249 (1971); *Washington v. Lee,* 390 U.S. 333 (1968); *Cooper v. Pate,* 378 U.S. 546 (1964).

Against this background, it is not surprising that lower federal courts have rejected the notion that state prison officials are immune from damages if they violate the constitutional rights of their prisoners, and they have awarded damages in appropriate cases. See, *e.g.*, *Sostre v. McGinniss*, 442 F.2d 178, 205 n. 51 (2d Cir. 1971) (en banc); *United States ex rel. Jones v. Rundle*, 453 F.2d 147, 150 n. 11 (3d Cir. 1967); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), *on remand*, 321 F. Supp. 127, 143-44 (N.D. N.Y. 1970). See also the extensive discussion of the panel in the present case on the question of immunity, in which the en banc court concurred. (App. 37-40).

Pierson v. Ray, 386 U.S. 547 (1967), indicates that in order to determine whether an immunity exists under section 1983 it is appropriate to look to the common law dealing with the kind of official against whom liability is asserted and the kinds of acts that official is alleged to have committed. Resort to the common law of both Mississippi and the remainder of the states shows that jailers and wardens have never enjoyed any immunity for mistreatment of prisoners in their care.

Mississippi law is crystal clear on this point. In *Farmer v. State*, 79 So.2d 528, 531 (Miss. 1955), the Mississippi Supreme Court rejected a defense of immunity and imposed liability on a jailkeeper, adopting the holding of *State ex rel. Tyler v. Gobin*, 94 F. 48, 50 (C.C. Ind. 1899), where it was stated:

> "If the law imposes [upon a sheriff] a duty of care in respect to animals and goods which he has taken into his possession by virtue of his office, why should not the law impose the duty of care upon him in respect of human beings who are in his custody by virtue of his office? . . . When a sheriff, by virtue of his office, has arrested and imprisoned a

> human being, he is bound to exercise ordinary and reasonable care, under the circumstances of each particular case, for the preservation of his life and health. This duty of care is one owing by him to the person in his custody by virtue of his office, and for a breach of such duty he and his sureties are responsible in damages on his official bond."

In *Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd,* 456 F.2d 819 (5th Cir. 1971), the district court, interpreting Mississippi law, held that the superintendent of a county penal farm enjoyed no immunity if he failed to properly care for prisoners under his control, and imposed liability under state law. 302 F. Supp. at 985-86. See also *Bacon v. Bacon,* 24 So. 968 (Miss. 1899), where the court found the superintendent and trustees of a state mental institution liable for improperly admitting persons thereto.

The common law in other American jurisdictions is no different. The general rule was stated in *City of Topeka v. Boutwell,* 35 P. 819, 822 (Kan. 1894):

> "[H]aving the prisoner fully in his power, the officer is then liable for any unnecessary harm or indignity done to the prisoner. It is the duty of all keepers of jails and prisons to treat their prisoners humanly. [They] . . . have no warrant or authority in law to be harsh and brutal in the management of those in their custody. For all needless sufferings and indignities which they impose they are accountable in damages . . . ."

See also *Kendrick v. Adamson,* 180 S.E. 647, 648 (Ga. 1935); *Village of Nixa v. McMullin,* 193 S.W. 596, 598 (Mo. 1917); *Hale v. Johnston,* 203 S.W. 949, 952-53 (Tenn. 1918); *Clark v. Kelly,* 133 S.E. 365, 368-69 (W.Va. 1926).

Since there is no immunity under Mississippi law or in the jurisprudence of other states for persons who mistreat prisoners in their custody, the court below was clearly correct in holding that no immunity should be read into section 1983 for such mistreatment.

VI.

THE FACTS RELIED ON BY THE FIFTH CIRCUIT IN REACHING ITS DECISION WERE UNCONTROVERTED.

Petitioners assert that there is substantial evidentiary conflict in the record as to facts relied on by the court of appeals in reaching its decision. We have extensively set forth the uncontroverted facts in our Statement of the Case, as did the panel (App. 9-12) and the en banc court (App. 50-54), and will thus limit this discussion to commenting on certain assertions of petitioners.

First, on the issue of nudity, petitioners state that there is an evidentiary dispute as to whether the male plaintiffs were made to strip naked and remain so for a day or more. Petition at 46. Yet, in their Statement of the Case, petitioner themselves state that "there was a shortage of underwear[7] which resulted in *some* of the detainees being left without clothing for periods as long as 36 hours." Petition at 4. Petitioners' own witness, Mr. Licata, upon whom they place great reliance, testified that he observed nude men in the cells. (R. 557). In short, we can see utterly no conflict in the en banc court's statement that "they were stripped of their clothing and left naked for varying periods of time, some for as long as 36 hours." (App. 53).

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[7]The record is devoid of evidence that the reason for the nudity was a shortage of underwear. Petitioners' counsel have apparently supplied this fact for the first time in this petition.

Petitioners state that there is evidence that no one was "required or forced" to consume a laxative. Petition at 39. The *stipulated* facts are that respondents "were required to . . . consume a quantity of laxative." (R. 205, Add. 3). Petitioners cannot avoid this stipulation by arguing that of the more than 250 persons incarcerated during this time, two may have evaded the laxative.

Petitioners cite Mr. Licata's testimony to the effect that respondents' were initially given "plenty" of toilet paper but this was cut when they "misused" it. Petition at 38. We do not see that this conflicts with testimony that respondents were given about one lap around a roll for each person in a cell. See R. 226, 325, 404, 460.

Petitioners offer no evidentiary conflict to the undisputed facts that respondents were given no bedding whatever or toilet articles such as soap, towels and the like; that they were herded up to eight to a cell and forced to sleep on bare steel bunks or concrete floors; that the temperature ranged from 60 to 70 degrees and that exhaust fans were in operation; that respondents, who were nude or wearing only underwear and were inactive for extended periods, were freezing under these conditions, and the like.

In conclusion, we would again emphasize that the facts relied on by the court below appeared in stipulations, admissions, and uncontradicted testimony, and none of the sixteen judges who reviewed this case found any evidentiary dispute in the record, on those facts relevant to the decision.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EXCERPTS FROM PRE-TRIAL ORDER
(R. 201-08, 1229-42)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

KATIE RUTH ANDERSON, *et al.*,
Plaintiffs,

v. No. GC669-K

J.J. NOSSER, *et al.*,
Defendants.

JAMES BRADLEY, *et al.*,
Plaintiffs,

v. No. GC 6654

J.J. NOSSER, *et al.*,
Defendants.

PRE-TRIAL ORDER

1. A pre-trial conference was held in this matter on the 23rd day of December, 1968, at 2:00 P.M.

* * * * *

7. The facts established by the pleadings or by stipulation or admission of counsel are as follows:

On or about October 2, 3, 4, 1965 plaintiffs and others engaged in Civil Rights demonstrations and marches in Natchez. Sometime between 10 A.M. and noon on Saturday, October 2, 1965, a large number of marchers, including some of plaintiffs were placed under arrest after marching half a block from Beulah Baptist Church and charged with violating Natchez Parade Ordinance of May 26, 1964, Ordinance Book F. p. 395. The arrested marchers, including plaintiffs were transported in buses

to the Natchez Municipal Auditorium. At the Auditorium, the arrested marchers were asked their names, addresses and ages, but they were not brought before any judicial officer for examination of their case. No written Youth Court order was obtained respecting any of the arrested marchers.

Late Saturday night those of the plaintiffs arrested that day, among others, were lined up in the auditorium and told that they were being taken someplace that had facilities to put them up comfortably, since the city did not have adequate facilities. Some of the children under 16 were released in the custody of their parents. A large number of marchers, including all of the plaintiffs arrested on Saturday, were put on three Trailways buses and driven to Mississippi State Penitentiary at Parchman. Defendant Breazeale, Superintendent of Parchman was called and notified of arriving prisoners, but no court order was obtained for their transfer.

The buses to Parchman were guarded by Natchez firemen, acting as ex-officio police officers. Eight members of the Mississippi Highway Safety Patrol travelling in four patrol cars met the buses in the vicinity of Natchez and escorted them to Parchman.

The buses arrived at Parchman early Sunday morning October 3, 1965 and proceeded to the compound containing penitentiary's Maximum Security Unit. The maximum security building has two wings, each divided into two cell blocks with 13 cells each, for a total of 52 cells. One of the four cell blocks, containing 13 cells is Parchman's "Death Row." Each cell contained two steel bunk beds, a toilet and a wash basin. Three of the cell blocks, excluding Death Row, contained a total of 39 cells, had been vacated to receive the Natchez prisoners.

The men prisoners, including all the male plaintiffs that had been arrested on Saturday were required to strip naked and consume a quantity of laxative. They were inspected and searched. The men were then placed in cells. The female prisoners, including all the female plaintiffs that had been arrested on Saturday were required to remove their shoes, stockings, sweaters, coats, jewelry and wigs, but not their undergarments, dresses, blouses, and pants, and were searched by female employees and trustees. They also were given a quantity of laxative. The women were then placed in cells. The prisoners were segregated by sex but not race. No one was permitted to carry any personal belongings into their cells including medicines and sanitary napkins.

On Sunday, October 3, 1965, about 10:30 A.M. a large number of marchers, including some of the plaintiffs, were placed under arrest shortly after the march began at Beulah Baptist Church and charged with a violation of the same ordinance. They also were taken to the Auditorium. Children under 13 were released later that day in the custody of their parents. Other arrested marchers, including all of the plaintiffs arrested that day, were sent to Parchman on two buses. The treatment of the prisoners at Parchman was similar to the treatment of the earlier group.

On Monday, October 4, 1965, about 9 P.M., a large number of marchers were placed under arrest after marching about 60 yards from China Grove Baptist Church. They were taken to the Auditorium and later that evening some of them, including all the plaintiffs arrested that day, were sent to Parchman on a single bus. The treatment of the prisoners was similar to the treatment of the first group of prisoners.

Prior to release of the prisoners, many, including many of the plaintiffs, had blood samples taken from them.

Plaintiffs were released on Monday, October 4, 1965, Tuesday, October 5, 1965 and Wednesday, October 6, 1965.

At all times relevant to the amended complaints defendant Nosser was Mayor of Natchez, Mississippi; defendant Robinson was City Marshall and Chief of Police; defendant Cameron was Fire Chief, and defendants Richard, Cowart, Beach and Flowers were members of the police force.

At all times relevant to the amended complaints defendant Birdsong was Commissioner of Public Safety of the State of Mississippi charged by law with the duty of supervision and control of all Mississippi Highway Safety Patrolmen.

At all times relevant to the amended complaints . . . defendant Breazeale was Superintendent of Parchman . . . .

At all times relevant to the amended complaints, New Hampshire Insurance Company was surety for defendants . . . Breazeale, pursuant to Mississippi Code, 1942, Section 7924, as amended.

18. This pre-trial order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. However, this order will control the course of the trial, and it may not be amended except by consent of the

parties and the court, or by order of the court to prevent manifest injustice.

This, 3rd day of March, 1969.

/s/ William C. Keady
UNITED STATES DISTRICT
JUDGE

/s/ L. A. Aschenbrenner
Attorney for Plaintiff

/s/ Joseph L. Zuccaro
Attorney for Defendant

/s/ Edwin E. Benoist, Jr.

/s/ C. A. Marx

/s/ William A. Allain

CERTIFICATE OF SERVICE

I certify that I have this day mailed, air mail postage prepaid, three copies of the foregoing to William Allain, Esq., P.O. Box 220, Jackson, Mississippi 39205, attorney of record for petitioners.

This the 30th day of June, 1972.